

RETRACTION

OF REFLECTIONS CONTAINED IN A

CONGRESSIONAL REPORT

AND RELATING TO A CASE PROSECUTED BY

E. DELAFIELD SMITH,

UNITED STATES DISTRICT ATTORNEY AT NEW YORK
FROM APRIL 4, 1861, TO APRIL 14, 1865.

WITH THE FACTS AND DOCUMENTS.

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INTRODUCTORY NOTE.

IN 1861, during the first month of Mr. LINCOLN's accession to the Presidency, I was appointed district attorney of the United States at New York.

Receiving manifestations of confidence from every department of the government, I held the office four years; and in 1865 was assured, authoritatively, that a re-appointment would be a matter of course. This I desired; less for the diminished emoluments which would follow the war, than as a recognition of faithful public service.

But during the few weeks which followed Mr. LINCOLN's second inauguration, a publication in a newspaper disclosed the fact that a congressional committee, misled by two *ex parte* statements, had embraced in a report not otherwise relating to my office, a paragraph reflecting upon me with regard to one of the thousand cases which I had prosecuted during the eventful period then drawing to a close.

Assuming that an administration which I had earnestly sustained, would not condemn without a hearing; I was attending to my official duties in New York, when, without notice to me, the then recently appointed attorney general, to whom I was personally unknown, and who erroneously presumed that I had been heard by the committee in answer to the statements in question, recommended my displacement. The President, accordingly, signed the appointment of another person; and this, without investigation, overwhelmed as he was with the culminating events of the war.

A few hours subsequently, when the case was understood by Mr. LINCOLN, he attempted my retention in office by authorizing the recall of the commission by which I was displaced. The mail, however, had put it beyond his reach.

The report of a congressional committee, followed by a removal, was not to be effectively controverted by a newspaper statement from me. I therefore silently resumed my ordinary professional practice; pained that any act of mine should be called in question, but confident that my exoneration would yet come through sources of corresponding authority.

To another committee of Congress afterward sitting in New York, I applied for a full investigation. This application was granted; and an examination was set on foot, when the chairman of the former committee, discovering that injustice had been done, entered, himself, upon a thorough pursuit of the facts. With a sense of right which does him equal honor, one of the authors of the accusatory statements, who had testified under a misapprehension which he explains, contributes, by his own evidence, to a true and just conclusion.

The result is, the reflections upon me appearing in the report referred to are wholly retracted by the members of the committee who signed it. And in the same spirit of justice, the attorney general who acted upon the report has repaired the injury to the extent of his power.

The retraction of the chairman of the committee and the concurring declarations of his associates occupy the first place in the ensuing pages. They are followed by two letters, one from Mr. SPEED, attorney general at the time of my displacement; the other from Mr. BATES, who held that position during nearly the whole of my official term.

My own statement is contained in a letter to Mr. HULBURD, dated June 5, 1867, written in reply to inquiries addressed to me by him. It is accompanied by documents which will be found in the appendix.

NEW YORK, NOVEMBER 27, 1867.

E. DELAFIELD SMITH.

FROM MR. HULBURD, CHAIRMAN OF THE COMMITTEE.

ST. LAWRENCE COUNTY, N. YORK,
BRASHER FALLS, *July 1, 1867.*

HON. E. DELAFIELD SMITH,

DEAR SIR:

As an act of simple justice, I feel bound to say, that the impressions produced upon my mind by the statements from Mr. George P. Nelson and Mr. Benjamin F. Mudgett, before a congressional committee of which I was chairman, in relation to your official action in the Mercer confiscation case, have been removed. The facts and explanations recently communicated to me by Mr. Nelson, verified by his oath, altogether change the whole aspect of the matter. If the committee, of which I am again the chairman, in the present congress, were composed of the same members, I should certainly submit these corrections to them. Under the circumstances, however, I feel that your vindication is due from me, particularly as I was the author of the report of the former committee.

So far as I am concerned, and in this I think I may also speak for my associates, the statement of Mr. Mudgett would not, as it stood, have been deemed such as to call for the notice it received, but for the state of the case afterwards presented by Mr. Nelson, and now explained.

It is clear that in demurring to proceed upon Mr. Nelson's verbal application, you acted in accordance with the tenor of the general instructions in your hands at the time, and with your own views of the law which a subsequent judicial decision confirmed. It is equally clear that when, after the lapse of months, Mr. Mudgett filed his written information, and although receiving the same discouragement insisted upon proceedings, you acted in good faith and without expectation of benefit to yourself or

to any one associated with you, in undertaking the case at his instance, and could not with propriety have pursued any other course, even if the circumstances had not naturally erased the first call from your memory.

The sworn statements of yourself and others, with the records and documents by which they are sustained, show that the mode in which you prosecuted the case, and the circumstances under which the information money was decreed, were unexceptionable. The proceedings were evidently conducted with uprightness and ability; and the practical result in this case, and in others which it was the means of setting on foot, appears to have been to the advantage of the government. The portion adjudged to the United States was guarded by you with scrupulous zeal, even to the extent of protecting it from sharing in some of the necessary expenses of the suit.

The fees certified to you by the court are shown to have been paid into the treasury of the United States, leaving your only compensation that received from the information money. Shared as that was by other persons connected with the origin or progress of the proceedings, and these laws being, in the language of a distinguished judge, "new and untried," and the suit itself a pioneer case, hardly more than an experiment of doubtful issue —the fee actually realized by you was by no means unreasonable in amount; and whether so or not, it is amply proved to have been voluntarily paid, and no one can complain of it. Its receipt was not prohibited by the letter of any law, and seems to be fully sanctioned by public policy as recognized in several statutes. It was not offered until after you had obtained judgment, nor paid until the proceedings were substantially closed; and under the facts now disclosed it could have had no influence unless to promote additional diligence for the government and its informer, whose interests were identical. It did not come from an adverse party, nor was it by any means a gift of a defendant to a law officer of the government upon the settlement of a suit, or the like, which he may have advised. From cases of that character, which have sometimes attracted our attention in other places, this is broadly distinguished. Whatever varying circumstances may attend those cases, this is in no respect parallel.

Without going into further particulars, I am free to say, that the character you bear for honor and integrity in your official,

professional and personal relations, will not suffer in the minds of those who fully examine, as I have now had the opportunity to do, all the facts surrounding this case. Whatever the report presented by me as chairman of the committee might have contained, I should not hesitate to repair an injustice if (however unwittingly) I had participated in its perpetration; but I am relieved from all possible embarrassment in this respect, as the report purported to be and was "without comment," and simply gave the facts as they were made to appear before the committee.

Among all the matters brought before the committee during your long term of office, (and they were neither few nor unimportant,) this was the only one in which any reflection was cast upon you. That fact may well be a subject of pride with you and your friends, in view of the vast interests confided to you in prize and other cases, and under the laws for the suppression of the slave trade, which you prosecuted with vigor and success.

While my position has compelled me to incur odium in exposing abuses, (and from that duty I have not flinched,) yet at all times I have intended and endeavored to be just; and I am always ready and willing to recognize meritorious public services, and, when proper, prefer to commend rather than censure.

It should be borne in mind that congressional investigating committees are frequently censured for testimony produced before them, reflective in its character, yet susceptible of explanation, as in your case, and still the exculpatory circumstances may tardily, if ever, come before them.

You are at liberty to use this letter in any way you may see fit.

Yours very truly,

CALVIN T. HULBURD.

FROM Mr. LE BLOND, OF OHIO.

I deeply regret that my name should have been attached to the report made to Congress in 1865, in which, without notice to him and under an entire misapprehension of facts, blame was thrown upon Hon. E. Delafield Smith. Mr. Smith is more than exonerated by the papers and proofs now before me, and which are mentioned in the recent letter of Mr. Hulburd, which I fully

subscribe to. An honorable distinction was won by him by the manner in which the duties of district attorney of the United States at New York were discharged during the four years of the war; and as great wrong was done him in the report, I regard it a duty as well to the public as to him to unite with my late colleagues in making all the reparation in our power.

F. C. LE BLOND.

Celina, Ohio, Sept. 10, 1867.

FROM Mr. ROLLINS, OF NEW HAMPSHIRE.

CONCORD, N. H., *July 27, 1867.*

Having carefully examined the evidence, including official records and other documents, referred to by Mr. Hulburd in the foregoing letter of the first instant, I am satisfied that great injustice was done Mr. Smith in the report, and I heartily concur in the views now expressed by the chairman of the committee. The original testimony relating to the then district attorney was taken by Mr. Hulburd during my absence. This case is entirely different from others, involving payments to government officers, which we have investigated elsewhere, and cannot be confounded with them.

E. H. ROLLINS.

FROM Mr. LAZEAR, LATE OF PENNSYLVANIA.

WINDSOR PLACE,

BALTIMORE, *Aug. 26, 1867.*

Having been but occasionally present during the examination in New York, but having entire confidence in the ability and integrity of the chairman, Hon. C. T. Hulburd, I acquiesced in and signed his report. Having the same confidence in Mr. Hulburd at this time, I take pleasure in expressing my belief in the justice and correctness of his letter of 1st July last.

J. LAZEAR.

NOTE.—The full committee consisted of nine members. The four who signed the report, and who, in the written declarations above, have retracted the reflections it contained, are politically divided as follows: Republicans, Mr. HULBURD and Mr. ROLLINS; Democrats, Mr. LE BLOND and Mr. LAZEAR. The report was made at the close of the second and last session of the 38th Congress, which expired March 3, 1865.

FROM MR. SPEED, OF KENTUCKY.

WASHINGTON, Aug. 27, 1867.

DEAR SIR:

When I became attorney general in 1864,* you were the district attorney for the southern district of New York. During the winter of 1864-5, rumors reached the office of the attorney general that an investigating congressional committee were taking evidence that would convict you of improper official and professional conduct. A short time after, the testimony taken before the committee was published in the New York papers. Taking it for granted that you had full notice and opportunity of explanation before that committee, I promptly, and without notice to you, advised your removal, and you were removed and the office given to Mr. Dickinson. My recollection is, that the President, Mr. LINCOLN, took my recommendation for a change, without himself looking into the report.

Since my arrival here, I have read with pleasure a letter to you from Mr. Hulburd, in which he retracts the reflections upon you, made in the report upon which I acted. The letter is highly creditable to Mr. Hulburd's sense of honor and justice. But for the report of the committee, of which Mr. Hulburd was chairman, and upon which I acted, you would have been continued in the office you held.

The same sense of justice that induced Mr. Hulburd to write the letter in question compels me to write to you this. Having wounded the official and professional pride of a gentleman, it affords me pleasure to undo, as far as I can, what was done by me to his injury.

I am, sir, most truly,

Your obedient servant,

JAMES SPEED.

Hon. E. DELAFIELD SMITH.

* Mr. SPEED succeeded Mr. BATES December 1, 1864, and was in office at the time of Mr. LINCOLN's death.

MR. BATES, OF MISSOURI.

ST. LOUIS, September 28, 1867.

Hon. E. DELAFIELD SMITH, New York,

DEAR SIR :

I regret, on your account as well as my own, the continued sickness which has hindered me from sending you, as early as otherwise I would, the letter which I promised concerning your hasty and ill-considered dismission from office. Though still very unwell, I send it now.

During most of your time as district attorney, I was attorney general,* and as such charged by law with the supervision of your office; and consequently, unless I neglected my own duties, I could not be wholly ignorant of the manner in which you habitually discharged yours. Your district, embracing the great city of New York, was burdened with an amount of business proper for your office larger and more various than any other district in the nation. And simple justice requires me to declare, that the manner in which you discharged that vast amount of duty was generally, almost universally, to my entire satisfaction. The only instances to the contrary were some few, in which, by an overstrained courtesy, as I suppose, you obeyed certain irregular instructions issued from other branches of the government at Washington, touching the conduct of certain cases then pending. And these instances I considered less as your own errors than as the faults of those who, without authority, assumed to direct your official action. Consequently I promptly corrected the irregularity as illegal and wrong in itself, and vexatious to subordinate officers by subjecting them to conflicting orders coming from opposite authorities.

Being myself charged with the general superintendence of the law business of the United States as administered in the courts, I was thankful to a district attorney whose orderly and method-

* Mr. BATES entered the cabinet of Mr. LINCOLN upon the first inauguration, March 4, 1861, and resigned December 1, 1864, having held the office of attorney general three years and nine months.

ical industry gave strength and plainness to the discharge of official duty, and whose professional skill and ability insured to individuals, in the main, a fair distribution of legal justice.

I know very little about the manner in which your ejection was in fact effected ; but I know something about the means by which such ends are sometimes manœuvred through to a successful consummation. Your own case as far as I know it is a pretty fair sample. Somebody who had political influence enough to be felt by a committee of the House of Representatives, and who wanted the office for himself or friend or to serve some party purpose, applied to the committee with *charges* against the foredoomed victim.—No matter whether a charge implies any thing illegal or immoral, or only a lawful and justifiable act ; still it is a charge ; and surely an officer may be removed *upon a charge*.—The secret accuser brought before the committee a few selected witnesses to prove the particular facts desired ; and the committee, or some of them, examined them, *ex parte*, in your absence, without any notice to you to enable you to confront and cross examine the witnesses against you, or by other witnesses to falsify or surcharge their statements.

And upon this evidence, insufficient in its matter and surreptitious in its manner, both the committee and the attorney general, obviously without any serious consideration of either the law or the justice of the case, leaped to the conclusion that you were a guilty man, and ought to be denounced as such and expelled from office.

The attorney general so reported your case to the President, with his own advice for your prompt dismissal from office. The President, no doubt urgently pressed with great national affairs, could illy spare the time to investigate the particulars of your comparatively small and private affair, and trusting in his own high opinion of the attorney general's learning and probity, adopted implicitly his views of your case, and dismissed you accordingly.

Lawyers and publicists, every man indeed who desires to see the public acts of the government supported by lawful and honest reasons, will be surprised to learn that the principal fact charged upon you by your accusers, and the only one which has not been subsequently formally repudiated and retracted in writing, was a charge which, supposing it fully made out in

lawful testimony, does not prove nor tend to prove the slightest degree of guilt on your part, as an officer, a lawyer or a man.

I have read the letters, which you showed me, from Mr. Hulburd, the chairman, and three other members of the committee, and from Attorney General Speed; and from these, chiefly, supported as they are by the other documents shown me, I learn that the only criminal matter of fact charged upon you, not already disowned and recanted, is in substance this:—That you were district attorney in New York, and as such in charge of the prosecution of a suit at law, in which the United States and an individual had a common and concurrent interest, with no conflict nor opposition between them; that the individual desired to have counsel of his own, personally charged with the care of his interests in the case; that he chose you for his counsel, and that you accepted his retainer and received his fee.

All the rest of the charges being waived and abandoned, *this* is your only crime. And I give it as my deliberate opinion, that the fact charged upon you is *no crime at all*, but a fair and legal transaction, justifiable in morals and sanctioned by the usages of the profession and the practice in the courts.

This organized assault upon you before the committee, and before the President through the attorney general, I cannot help considering a conspiracy to rob you of your office, by first blackening your character. I make no charge of complicity in the dishonest trick. My only object in writing this letter is to vindicate your personal and professional character.

Very respectfully, your friend and servant,

EDWD. BATES.

NOTE.—In printing the above letter, some passages at the close are omitted; but those, only, which might be construed—although not so intended by the distinguished writer—as unjust to men who were misled to my injury, but who have deliberately endeavored to repair it.

THE CHAIRMAN OF THE COMMITTEE TO Mr. E. DELAFIELD SMITH.

ST. LAWRENCE COUNTY, N. YORK,
BRASHER FALLS, *May 22, 1867.*

Hon. E. DELAFIELD SMITH,

SIR:—Gentlemen with whom I recently became acquainted, and who manifested much regard for you, assured me that injustice was done you in a report made in 1865 by a congressional committee of which I was chairman.

Having learned from them that Mr. George P. Nelson had in conversations made important explanations of his brief original statement, I addressed him a letter of inquiry. His answer is honorable both to him and to you, so much so that I am disposed to pursue the matter further.

I would therefore thank you to read over the statements made to our committee by both Mr. Nelson and Mr. Mudgett relating to the Mercer confiscation case, and give me the facts with such explanations as you may deem pertinent; adding, if you please, any documents or depositions which will throw light upon the matter, as far as you are concerned.

Yours very respectfully,

C. T. HULBURD.



MR. E. DELAFIELD SMITH

TO

HON. CALVIN T. HULBURD.

NEW YORK, *June 5, 1867.*

Hon. CALVIN T. HULBURD,

Sir:—In 1863, as district attorney, I conducted a suit to confiscate stock owned by the confederate general, Mercer, in the Minnesota Mining Company. A moiety of the proceeds was decreed by the court to an individual prosecutor. From that portion, through his free act, I realized a fee, which as a lawyer and advocate I had honorably earned, and which no reason, founded in law, in public policy, or in official and professional propriety, called me to refuse. Throughout the last two years of my term of office, all the incidents of the case were widely known; and they elicited no audible criticism, until my appointment to a second term became a supposed subject of consideration. Seized upon by persons then in the custom house of this city, a case which might justly have been cited to my credit, was perverted to my injury, and was overlaid with a complaint in substance as follows:

First.—That without good reason, I omitted to prosecute the stock, when orally applied to by Mr. George P. Nelson, although, several months afterward, I proceeded against it upon the written information of Mr. Benjamin F. Mudgett; and that I might and should have so managed as to secure to the government the entire proceeds of the confiscation.

Second.—That the fee realized by me, as the prosecuting attorney, was not voluntarily given, but exacted.

These accusations were so secretly made and pursued, that they never came to my knowledge, until two *ex parte* statements relied upon to sustain them were published in a newspaper with an extract from your report.

With regard to the alleged application of Mr. Nelson, his testimony shows it was merely a brief call, which might easily be, as it was, forgotten. The surprise his statement caused me, when first read in a public journal, copied from the report, could be attested.

When Mr. Mudgett informed against this stock, I had no idea that any person had ever spoken to me concerning it. And even with Mr. Nelson's statement before me, I could not recall his visit. It is not strange, for applications of that nature were numerous; my official duties were absorbing; it appears that no memorandum was left by him, and that I made none undoubtedly because, for reasons hereafter given, I did not think a case could be maintained against stocks situated as those were. If the interview, as related, was not calculated to make an impression at all, it was still less likely to leave any in relation specifically to the Minnesota stock, for Mr. Nelson says he did not mention this alone, but spoke of it in connection, only, with that of several other companies.

At the assigned time of this interview, I was predisposed to discourage such applications; and neither at that period nor for long afterward, until this case was itself commenced, was a single suit for the confiscation of "rebel property" pending in my office. And why? In August, 1861, Congress passed the first "confiscation law." Numerous suits were instituted under it; but they were discontinued by direction of the government, and in a printed circular like prosecutions were discountenanced unless a clear and unquestionable case should arise. In July, 1862, the second law was enacted, enlarging the grounds of confiscation. The volume containing it was not received till late in the year. The President, by a written order, referred the enforcement of the two statutes to the attorney general, who subsequently wrote that he would issue instructions. As the proceedings were to conform to those "in admiralty or revenue cases,"* he occupied much time,

* 12 U. S. Stat., 591, § 7.

during the winter of 1863, in corresponding with district attorneys in the maritime districts, and obtaining statements of the prevailing practice in that class of suits. The preparation and transmission of the proposed circular instructions were long delayed. In a printed form, they were finally received at my office, and were filed with other general communications from the departments. They were laid before me by my assistant, when Mr. Mudgett's application was submitted to my consideration. The policy of confiscation, frowned upon in former instructions, was favored by these. By the former I was of course influenced at the period assigned by Mr. Nelson to his first call. When Mr. Mudgett urged his application to me, those were replaced by the later instructions.*

Under these circumstances, Mr. Nelson would naturally find me, at the alleged time of his visit, indisposed to enter upon confiscation suits at all. But, moreover, even when, subsequently, Mr. Mudgett applied and followed up his application, and I took the subject into serious consideration, it appeared to me, as a lawyer, that the stocks in question could not be condemned in the courts of this district. Under these statutes, a seizure of the property was the foundation of the proceeding. The certificates of these stocks were not accessible, and the corporations were not created in this state. Although this company had in New York its transfer books and an office for the transaction of business, it had no property or legal existence here. How was a seizure to be effected? The laws did not provide for any process in the nature of an attachment by notice, as in suits under state laws to reach the credits and effects of foreign corporations or non resident debtors. Yet the service of such a notice upon the company's officers here, was the nearest approximation to a seizure possible. Mr. Nelson says, I expressed to him the opinion that stocks so situated could not be confiscated. He therefore, as he states, withdrew without leaving any written information. If he had left one, it would have been filed and

* Printed Circular, State Department, 1861, "to prevent seizure of property belonging to citizens of insurrectionary states, not warranted by law." —Circular Instructions, Attorney General's Office, 1863, concerning "proceedings to be had under the act of Congress of the 17th July, 1862, and the act of August 6th, 1861, commonly called the Confiscation Laws."

recorded in a book. In that case, the suit, whenever prosecuted, would have proceeded upon the information first filed. Months afterward, Mr. Mudgett applied with regard to one of the stocks, and the same opinion was given to him, first by my assistant, Mr. Andrews, then by Mr. Allen, and again by me. But he repeatedly returned; renewed his application; filed an information in writing, and insisted upon a prosecution. It was at last undertaken, but more as a legal experiment than otherwise. The case stands first in the "docket of confiscation suits." As Mercer, notoriously, was a confederate general, the difficulty was technical; but being a question of jurisdiction, it was formidable. By a piece of good fortune, no defence was interposed. The company did not appear except to aid the proceeding. The question of law did not arise, for judgment was obtained by default. But the point, if taken, would have been good, nevertheless, and fatal to the proceedings; for in a subsequent and similar suit, known as the "Wiley case," which, unlike this, was litigated, it was raised and sustained in spite of the efforts not only of myself, but of Mr. Evarts, Mr. Donohue and the present Judge Blatchford, associated with me in that case. I had, therefore, good foundation in law for my judgment that this stock could not be condemned. It thus appears that my omission to proceed upon the oral application stated by Mr. Nelson, was due to a well grounded legal opinion. The circumstances show how natural it was his brief call should have escaped me. Why, long afterward, I undertook the suit at Mr. Mudgett's instance, is explained by the latter's persistency and the changed character of my instructions from Washington. How the legal obstacle failed to obstruct, is explained by the default. And that there *was* an obstacle, is shown by the failure of a subsequent case which had the misfortune to be litigated.

The idea that Mr. Nelson was put off and Mr. Mudgett encouraged with a view to compensation, is disproved in the original testimony itself, where it appears he was not encouraged at all, and a contribution to my office was not intimated until long after the suit was instituted, nor, indeed, until after the court had directed judgment. Even then, both Mr. Allen and Mr. Mudgett agree that the proposition did not originate with me. If that object had been contemplated in commencing the suit, a

stipulation would have been sought at the outset. Mr. Mudgett's application was not made a short, but a long, time after that stated by Mr. Nelson, and to both, when first applying, the same answer appears to have been given. One dropped the matter at once; the other returned and persisted. I once saw a conjecture that Mr. Mudgett might have obtained his information from my office. But as proved in the original statements, it was given to him by a clerk of the company, who happened to be a fellow boarder. The suggestion was a calumny refuted by the record itself.

All adverse inferences which had even an apparent foundation, derived their force from the bearing of Mr. Nelson's original statement. It is only recently I could bring myself to address him on the subject. I then said little more than was necessary to guide him in making, for himself, a thorough investigation of the matter, in connection with his own recollections. I could not wish a more ample vindication than that contained in the facts and explanations now given by him.* Mr. Mudgett's testimony itself does not establish, nor, upon its face, apparently, does it seek to show, any wrong on my part upon the government, himself, or any person. The stenographer of your committee says it appeared to make little impression when taken, and you assure me it would have been dismissed but for the construction placed upon it when Mr. Nelson's statement was subsequently given.

It has been said that when I finally determined to prosecute the case, I could have proceeded in such a way as to deprive the informer of any share in the proceeds. And assuming I could, it is asserted I ought. The existence of such a power or duty never occurred to me. The point was not one Mr. Mudgett would be likely to raise. Overwhelmed with official duties, I handed the case over to my assistant for prosecution, without discovering, upon such examination as I had given the two laws, room for such a suggestion. To Mr. Nelson, when he called, it seems no such question had occurred; for he said he "understood the informer was entitled to one half."

The first law in terms devoted the proceeds to the United

* See appendix, page 43.

States and the informer in equal parts.* The second had no such provision, but left the first unrepealed, and simply went on to multiply the causes for which "rebel property" could be confiscated. It is a settled rule of construction, that where one act is followed by another which does not repeal the first, and both are in *pari materia*, they are to be construed together, and effect is if possible to be given to every provision of each.† In the printed instructions of the attorney general, the two laws were treated together. It is true, in the second act the words "for the use of the army" were inserted; but they were nugatory, because all moneys realized to the government were to go into the United States treasury;‡ there was no provision which could keep them separate from other funds. The practical result was, they were necessarily applied to general purposes, and the army was sustained, not by such provisions as this, but by the entire resources of the country. If the clause in question be operative at all, it is begging the question to say it would appropriate not only the government's share, but also that of the informer, which the first act secures to him.

The informer's claim involved a question not only of strict legal right, but also of public policy. If the object of confiscation was to prevent and punish rebellion, the end could not be attained unless informations were induced by the hope of gain. If the purpose was to realize money from "rebel property," the records of the district attorney's office show that knowledge of this case attracted other informations from which the government realized thousands of dollars in excess of what the court decreed to Mr. Mudgett here.

Not, however, by any exceptionable mode of prosecuting the case, but by the ordinary and regular operation of law, the informer obtained the fruits of his information. When, as the foundation of a suit, a libel or complaint is filed by the government, it is not verified. The system of pleading in the United States courts is liberal. Several suits *in rem* under similar statutes are not allowed. Where—as for instance under the revenue laws—goods may be forfeited for either of several different causes

* 12 U. S. Stat., 319, § 3.

† 19 Vin. Abr., 525, pl. 132; Bac. Abridg., Stat., 1, 3; 9 Cowen, 437.

‡ 12 U. S. Stat., 591, § 7.

and under either of several similar statutes, the district attorney pleads, not under one alone, but under all. If he take judgment by default, the forfeiture also is under all. If a defence be interposed, the forfeiture will be under one or two or all, according to the proofs.* So here. The libel, in mere routine, was drawn under the two confiscation laws, alleging, in the language of both successively, all the facts which either statute made ground of confiscation. This was in accordance with practice and precedent.† And it was right. For in the event of a defence, we might fail under one law and succeed under the other. By one, property was condemned if used to aid the rebellion. If, as happened in another case, the dividends or any part of them had been drawn from this stock and applied to rebel use, that law might suffice. By the other, property was condemned if the owner was a rebel official or had personally aided the cause. In that event, the latter law was available. Although Mercer was in the rebel service, it was not easy to prove it; while the other ground of confiscation, if existing, could probably be established by more accessible evidence, such as correspondence with officers of the company here.

But if the libel was incorrectly framed, no design lurked in the error. My personal agency in its preparation was limited to directing my assistant to proceed with the suit. He did so, and the libel was drawn by him without consultation with me as to its averments. I signed it, however, and made it my own. If I had myself drafted it, I should not have thought of confining the prosecution to one law and ignoring the other, for the astute purpose of helping the government by disappointing its informer to whom the case owed its origin.

The moment a statute of the United States makes provision for an informer, the district attorney becomes, by law, his advocate, as well as that of the government. It is then just as improper and unprofessional for that official to be ingenious to defeat the claim of the one as the other. Such a provision is to be construed and applied liberally, and is not opposed but favored by the interests of the government. For his protection, the informer may rely upon the district attorney alone, and in

* See letter of Mr. Justice NELSON, appendix, page 51.

† *Benedict's Admiralty Practice*, §§ 403, 406.

that case, if he see fit, may see him as he might any lawyer; or he may employ additional counsel of his own; although the former course better comports with the orderly conduct of the proceedings. These principles, recognized and acted upon in the courts of the United States from the organization of the government, constitute a sufficient answer to those who imagine that the informer received in this case any professional services which he was not legally entitled to enlist and stimulate. And they likewise show that a promise of reward from him could influence the district attorney in one direction only, and that the line of his official duty.

The "monition," containing the substance of the libel, was regularly published by the marshal, and was also served on the company. Upon the return day, Mr. Allen attended court, but no one appeared for either Mercer or the company. The libel was taken "as confessed." All its allegations, as well those under one statute as the other, were by law and practice adjudged true. Default was entered. The court directed judgment. And it was so recorded in the minutes.*

Thus to the judgment, through legal and correct proceedings, the government became entitled; but no more absolutely than the informer to a share in the proceeds. If, after he had brought this information and set on foot this suit, I could have deprived him of reward by any management at the commencement or during the progress of the proceedings, to do so would have been a wrong upon him, upon public policy, and upon law itself. But I had no such power. If the libel had not been drawn under both laws, he could have procured an amendment in that respect. As the judgment stood, he had no need to do anything; for every step the case progressed inured to his benefit as well as to that of the government.

The right of the informer to share and the inability of the district attorney to prevent it are illustrated in the case of the *United States against Indiana State Stock, &c.*, decided in the Eighth Circuit. I present an exemplified copy of the record. The suit was transferred to the Circuit Court, and was there adjudicated by Mr. Justice DAVIS, an eminent judge of the United States Supreme Court. As here, the libel was drawn

* *Benedict's Admiralty Practice*, §§ 435, 452, 454.

under both laws, and judgment was entered by default of the owner to appear. While, however, it was not denied that the owner of the stock had aided the rebellion, it appeared, in answers filed by the state officers, that neither the bonds themselves nor any income therefrom had been so used. The case was therefore less strong for the informer than this; for here, as already seen, the entire libel stood upon the record uncontradicted. This Merceer case having attracted public attention, the right of an informer to a moiety of the property condemned was expressly raised. The court, upon examining the statutes, determined that the informer was entitled to half the net proceeds, and it was so adjudged in the decree.*

I produce other records from United States courts in various sections of the country. My mode of proceeding and the informer's right to share are alike confirmed. In some cases, not only are proceedings under the two confiscation laws blended in one suit, but they are united with complaints under non-intercourse and revenue laws. In one instance, where a district attorney in Philadelphia had instituted two distinct proceedings against the same property, the record shows "they were in effect consolidated;" the court allowed but one bill of costs in both; a single decree was entered; and the claim of an informer, grounded in one suit only, was enforced in the common judgment. In another district, a case proceeded upon information of the marshal, and a moiety of the proceeds was received by him.†

When Mr. Daniel S. Dickinson succeeded me in office, the method of prosecuting confiscation suits and the right of the informer were examined by him, upon request of Mr. Allen, whom he retained as an assistant. The result was, Mr. Dickinson himself pursued the precise practice I had adopted. In every new as well as in every pending case, he procured a decree dividing the proceeds between the United States and the informer in equal parts.

And it is, after all, the decree itself, which gives the informer

* See appendix, pages 47 and 48.

† On the right of a person to share in the proceeds of a confiscation procured upon his information, see note, entitled *Law, Practice and Precedent*, appendix, page 49.

his portion. Although drafted by the district attorney, it is submitted to the court; and although brief, it is retained and examined. It receives the judge's emendations and is filed with his signature. They who imagine I could have awarded or withheld the informer's share according to my caprice, know little of the scrutiny exercised by the careful judge who signed this decree. I had diligently prosecuted the case; but the judgment was his, not mine.

This brings me to the alleged exaction upon Mr. Mudgett. The allegation is not supported by a single proof, unless found in his own testimony; and when that is read, it appears no such accusation is either made or sustained; on the contrary, it is expressly disproved by repeated declarations. When, in addition, we consider either the circumstances of the case or the profession and maturity of Mr. Mudgett himself, the idea of imposition will not appear probable nor even possible.

He admits (and in this they both concur) it was with Mr. Allen, when I was "not present," he had the first interview at which the subject of compensation from the information money was broached. The circumstances of that interview are differently remembered by the two. Without imputing intended misrepresentation, I will point out the differences between them. According to Mr. Mudgett, he met Mr. Allen, and the latter requested him to call. According to Mr. Allen, the call was upon his own motion, after observing in a newspaper a report of the case. Mr. Mudgett says Mr. Allen suggested he should be liberal, and he replied he was willing to be. Mr. Allen states the suggestion originated with Mr. Mudgett. The latter says, for the purpose of securing activity in the case, he was willing to give \$5,000; he was told the proposition would not be entertained; it was not enough; one half was right. Mr. Allen, on the contrary, alleges, Mr. Mudgett, appearing elated at the default and judgment, declared, without solicitation or suggestion, if the case went through, he would divide with him the proceeds of his share. Mr. Allen's version is substantially the same which he gave me at the time. He submitted the question whether there could be any objection to accepting the offer, and at the same time or subsequently said we would regard it as a joint fee which we should deserve if successful in this first and leading case.

The difficulties in the way of the prosecution were by no means ended by the judgment. If I was right that this stock could not be legally seized, the court might have proceeded without jurisdiction, the judgment prove a nullity, and the company successfully resist a transfer of the stock, as was subsequently done by the Great Western Railroad Company in the "Wiley case." To Mr. Mudgett I had before explained this difficulty, and I sent for him now to consult in relation to it. It was necessary the stock should be in court by transfer to its clerk or to the marshal. We could proceed no farther without it. Objection to the transfer had already been made by the president of the company. The by laws required a surrender of the certificates, which we of course could not produce. The directors feared Mercer or his assigns might hereafter hold the company responsible and claim indemnity for parting with his stock. Mr. Mudgett came in accordance with my summons, and thought he could aid me through an acquaintance in the company itself. He was anxious to have the obstacle surmounted; evinced much satisfaction with the successful obtaining of the judgment; urged that Mr. Allen and myself should press the case forward; and said if it was carried through, he should be satisfied with \$15,000, and should give to Mr. Allen, as his attorney, the balance of his share. The proposition was his own, and it was in substance the same made to Mr. Allen in my absence. As the stock was then selling, the shares in suit were expected to realize \$60,000, of which the informer's moiety would be \$30,000.

It being questionable whether the court had acquired jurisdiction, my steps to obtain the transfer were of delicate determination. Having made unsuccessful application to the company, I now desired to see and consult Mr. Mudgett "before any thing farther was done." He was mistaken in ascribing that wish to a matter upon which, as Mr. Allen had informed me, he had already fully delivered himself.

The offer, made to my assistant, and repeated to me, was not compelled, induced or prompted by any requirement, claim or suggestion of mine. No stipulation, no agreement of any kind, was exacted or sought. And I simply accepted, for myself and assistant, the voluntary engagement of Mr. Mudgett to allow a fee from a recovery already by law assured to him in case the stock in suit should ever be actually reached and sold. Acting

in good faith and with honorable motives, I regarded him as allied to the government in a common object, where the interest of the one promoted the policy of the other, and an employment by either must act as a retainer from both.

A letter, received by Mr. Allen after this suit was ended, contains a precisely similar engagement in another case, in which, however, no property was found and nothing was realized.*

The prejudicial influence of Mr. Nelson's original statement having been annulled by his own explanations, I hope the testimony of Mr. Mudgett may be re-examined. You will perceive, that whether "willing to wound" or not, he makes no charge of any act, omission, or threat, which could operate upon him as an extortion or exaction. His very strongest declaration is, "This matter was presented to me as a *sort* of claim, as *I understood*." For that understanding, I was not responsible. He says, in substance, he was willing to stimulate activity in the prosecution; but there is no intimation of any want of it. On the contrary, the case had been commenced, pressed forward, and carried to judgment, without any such inducement, and he expressly admits there was "no delay or hitch in the prosecution." Clearly, from what he had already observed, he had no reason to apprehend any. But he says, "the idea struck" him, it was in the *power* of the district attorney to have no part given to the informer, and this power *might* be exercised. To that apprehension, however, he gave no expression, and he does me the justice to make the following declarations: 1. "There was no intimation that they would do any thing of the kind;" 2. "No intimation was made to me about what they would do;" 3. "It was not intimated to me that the power would be exercised;" 4. "I know several decrees were entered by Judge Betts in the same way, in cases where I had no reason to suppose that any such claim was made by the district attorney;" 5. "I have no reason to say that Mr. Smith would have taken any other course than he did take in the matter." I have already shown, 1. I had no such power; 2. If I had, its exercise would have been a wrong not only upon him, but also upon the government; and 3. If the power existed, I

* See letter, dated Dec. 28, 1863, appendix, pages 59 and 60.

was not conscious of it. It was, therefore, no weapon in my hands. An attorney may practice extortion upon a client, by means of superior knowledge. If Mr. Mudgett was right as to the power he speaks of, the superior knowledge was his, not mine. But he was a mature lawyer, a politician, and a deputy collector at the head of the entry department of the custom house. That he was in any sense a victim, is nothing less than absurd. Nor does he affirm it.

The promise was voluntary. So was its performance. Having fairly cited from his testimony every word which implies it was not, I now summon his own declarations that it was. 1. His letter of August 3, 1863. This letter was written after the close of the case, and is ante dated. Its history is this: In the course of the prosecution, Mr. William Fullerton,* the counsel of the company, entered an appearance, and with a view of better protecting his client from future liability for transferring this stock, proposed certain amendments to the decree, which I consented to, and the court adopted. This was the end of the company's opposition. They now came forward and aided the proceeding. (If they had not, it must have failed, as it subsequently did in the "Wiley case," where the Great Western Railroad Company would not transfer the stock in suit there, and experience demonstrated they could not be compelled to.) Being merely stakeholders, the directors thought Mr. Fullerton's fee should come from the fund and not from their treasury. But I would not consent to reduce the government's share. Thereupon Mr. Mudgett himself agreed to pay the fee in question, to the extent of ten per cent. upon his information money, and appeared glad of the opportunity to conciliate the company. Some time subsequently Mr. Fullerton called and said that Mr. Mudgett, after voluntarily paying him the fee, now demanded its return, and as he had understood a fee was also received by my assistant, we ought, in his judgment, to have in black and white that it was voluntarily given, for a charge of extortion against an official was easily made and readily believed, and Mr. Mudgett might sooner or later take the same course with us as with him. No suspicion of such a possibility had occurred

* Now judge of the Supreme Court and Court of Appeals of the state of New York.

to me. Of Mr. Mudgett, who had come to this city from Maine, I had never heard, to my knowledge, before he gave this information. All I knew of him was, he had been well spoken of by Mr. Allen. Mr. Fullerton's advice, however, induced me to send for him. He called, and I said in substance, "Mr. Mudgett, you know officials are apt to be attacked sooner or later, and it seems to me we ought to have something to show you made this compensation of your own accord." With a manner which repelled suspicion, he replied, "Certainly I did; what do you want me to do?" I rejoined, "Well, I don't know, suppose you write a letter to Mr. Allen." To this he cordially assented; but said he was in haste then, and would send it from the custom house. The letter came. It is explicit. A lawyer of years may rightly be held to his own admissions. If this letter be true, there was no exactation. That it was written after the case was closed, and his interest therein no longer within our possible control, renders it stronger than if sent at its date. The form of the letter and the date were Mr. Mudgett's own conception, unaided by any suggestion from me.* 2. During the spring following, (1864,) some of the officials then in the custom house manifested unfriendly feeling toward the district attorney's office. (I had before encountered like opposition from that direction, as had my predecessors. And it was active when the question of my re-appointment approached. The attack with regard to this case originated there, but not with Mr. Mudgett himself.) We heard it had been said at the custom house that he was obliged to pay to have his suit prosecuted. Mr. Allen called and inquired as to this report. Mr. Mudgett declared the story did not come from him, for as he (Mr. Allen) knew, the gift was perfectly voluntary.† 3. I was, of course, much aroused; I sent for him; demanded an explanation; and without waiting for it, said I would repay all he had parted with, if he was in any way dissatisfied. To this proposition he declined to listen, assuring me he had not started any such report; and he added, "It was perfectly voluntary, perfectly so."‡ 4. The rumor

* For this letter, see appendix, page 57. See, also, letter of Judge William Fullerton, appendix, page 56.

† See Mr. Ethan Allen's testimony, appendix, at page 66.

‡ See affidavit of Mr. George P. Andrews, appendix, pages 51 and 52.

was taken by some person in the custom house to Mr. Joshua F. Bailey, then making investigations as a special agent of the treasury department. He summoned Mr. Mudgett; examined him; and dismissed the matter, finding nothing to justify its pursuit.* 5. Mr. Theodore F. Andrews, the stenographer who took the testimony before the committee, heard a conversation in which Mr. Mudgett admitted the payment was not induced by any act or word of mine, and was entirely voluntary.†

That it must have been so, the manner in which it was made will demonstrate. When the stock in suit was sold, it was done by the marshal, through a broker selected by Mr. Mudgett himself. It was difficult to dispose of it all. After a portion had been sold, Mr. Mudgett bought the remainder, and had it transferred to a third person, because, for reasons which appear in his correspondence with Mr. Allen, he did not wish the company to know that he was a purchaser. For the purchase money, he gave his check to the clerk of the court, and requested its retention until the final distribution, when it was returned to him as so much money. Three hundred and thirteen shares became his in this way. That Mr. Allen intended to share with me whatever he might receive, like every other fact in the case, was openly spoken of, and Mr. Mudgett knew it. In view of it, he himself directed the shares purchased by him to be put in four certificates, two for himself and one for each of us. The person in whose name they had been temporarily placed by the clerk of the court at Mr. Mudgett's request, executed the usual blank powers of attorney to facilitate their transfer, but never took the custody of the certificates themselves. Mr. Mudgett brought them from the clerk's office to mine; came into my room accompanied by Mr. Allen; and in a friendly way laid two of the certificates upon a table near my desk. This took place several days before the formal distribution and close of the case. To the clerk of the court and to others, he expressed satisfaction.‡

* See letter of Mr. Joshua F. Bailey, appendix, page 53.

† See affidavit of Mr. Theodore F. Andrews, appendix, page 53.

‡ See Mr. Allen's testimony at pages 63 and 64, in the appendix. See, also, papers and letters of Mr. Mudgett, appendix, pages 57 to 60. And see letters of Mr. Betts and Mr. Bullus, clerk and assistant clerk of the United States District Court, appendix, page 54.

The purchase of a part of the stock, with the ensuing complication, had been his own act, without my previous knowledge. He selected his own mode of carrying out a proposition by himself voluntarily made. If he had chosen to retain his entire share, as he subsequently did in another case, he certainly might have done so. The judgment was with the court for execution, not with me. The informer's share was held by the clerk, not by us. The receipt, without which it would not be parted with, was his to give or to withhold.

For more than two months the two certificates lay in our hands without a sale or transfer. And when we discovered that another person had also aided the proceeding, and we proposed to subdivide our stock with that person, Mr. Mudgett said, "You may do as you please *with yours*, I shall give nothing from mine."

It has been asked, What could have been the motives of Mr. Mudgett's offer? One he himself explains. The idea had struck him that the district attorney had the power to withhold the informer's share and give the entire proceeds to the government. He repeatedly admits no such intimation was ever made. He adds, as before quoted, "I have no reason to say that Mr. Smith would have taken any other course than he did take in the matter." Yet he throws out the idea, that the power, of which he imagined the existence, *might possibly* be exercised, unless he should make us interested in the realization of his share as informer. Here, certainly, as he understood the case, was a most ample motive; one, however, utterly unrevealed to me. As I have already demonstrated, 1. I had no power to deprive him of his share; 2. If I had, it would have been such a palpable wrong upon law, public policy, and him, I would not be likely to attempt it; 3. Whether I had or not, neither its existence nor its exercise ever once occurred to me as possible. Under these circumstances, I am not responsible for the secret working of his mind. The facts disclose other motives of equal power. Mr. Allen ascribed his conduct to a generous recognition of services which had carried the case on to judgment, coupled with a desire to conciliate influence and support for a lucrative official appointment then desired. To me, it appeared the ordinary case of a man interested in a doubtful suit, anxious to proffer a premium upon the exercise of skill and diligence in surmounting obstacles and carrying

the case through to a practical result. It would cost him nothing, and his promised liberality did not strike me as at all remarkable. The difficulties I have before described in the way of procuring a transfer, were formidable; he could not aid in removing them as he had hoped; they rendered the final issue a matter of uncertainty and doubt. This is the same motive that subsequently induced his agreement to pay the fee of Mr. William Fullerton, the counsel of the company from which the transfer was required. In his testimony, he speaks of the fee which he acknowledges was proposed by him to Mr. Allen, as likely "to make them active in the matter." He adds: "I regarded the whole thing as in the hands of the district attorney, and of course neither the government nor I could make any thing out of it unless he was disposed to prosecute it." It is true the case had been successfully advanced so far, without any inducement but a sense of public duty. It is true, also, as Mr. Mudgett admits, there had been no intimation that exertions would be in any event relaxed. If my duty to the government and its informer was sacred, so is that of every attorney to his client; nor are there many lawyers, however scrupulous or even fastidious, who have not at times become interested, beyond an ordinary fee, in the result of litigations entrusted to their care. Unaware, as I was, of all that may have been in Mr. Mudgett's mind, I could not regard the offer as an imputation. It was merely a recognition of the fact that a lawyer will ordinarily, except in cases of charity or distress, work more earnestly with than without the incitement of a fee. Eminent advocates were employed to assist me in the "Wiley case." That employment was authorized by the informer there; and it was from his share their fees were to be paid. In this case, the informer sought to animate the exertions of the district attorney and his assistant; in the other, to add to theirs, the efforts of additional counsel. The motive was manifestly similar in both cases.

Mr. Mudgett's gift was a fee, contingent upon success in obtaining a transfer of this stock under circumstances of difficulty and doubt. According to his offer, it was to amount to half of his moiety; and this half, as I have said, Mr. Allen and myself agreed to share equally. The moiety was reduced, however, in the first instance, to the extent of nearly \$3,000, to pay the fee

of Mr. William Fullerton, the company's counsel, who received it from Mr. Mudgett, with the approbation of the company, as the former explains.

Again the amount realized by us was materially reduced as follows: Mr. Alexander Fullerton, the clerk in the office of the company from whom Mr. Mudgett obtained his information, subsequently came forward and claimed that he had imparted it to the latter as his attorney at law, upon an agreement to share the fruits. Mr. Mudgett denied this, and suit was brought; but Mr. Alexander Fullerton said Mr. Mudgett was not responsible, and it was too late to reach him. There was plainly no legal claim against Mr. Allen and myself; but we ultimately believed Mr. Alexander Fullerton had in truth contributed to the result and should be rewarded. We therefore gave him one third of our stock, with which he was satisfied. We did it as an act of justice, in which Mr. Mudgett, taking a different view, declined to unite.*

After these reductions, the amount realized by Mr. Allen and myself, was about \$4,000 each. Considering the labor and vexation incurred in prosecuting the case; the obstacles overcome; and the result attained, the amount is certainly not large. Freely contributed from the information money, it left the government's portion unimpaired. And this was the extent of my compensation. Your report, misled by one of the mistaken statements in Mr. Mudgett's testimony, speaks of "taxed costs and 2½ per cent. commission which went to the United States district attorney." This is not correct. Those costs and fees went to the United States, not to me.† They amounted to \$1,237 87; and added to the government's legitimate share, the treasury realized \$30,827, sufficient to pay the ordinary salary of the district attorney for more than five years. Nor should it be forgotten that as before intimated, a knowledge of this case attracted other informations, from which the government received thousands of dollars more. Of all the informers, not one ever did, or with truth could, allege either the exactation or intimation of a fee. But one beside Mr. Mudgett ever offered

* See letters of Mr. Alexander Fullerton and of his counsel, Mr. Chambers, appendix, page 55.

† See certificate of the Comptroller of the Treasury, appendix, page 51.

or paid any; and considering the number of cases prosecuted, those who cherish the most stringent ideas of official or professional compensation, would acknowledge that the new and extraordinary labors imposed by these laws were rendered with moderate remuneration.

If I doubted the propriety of accepting this fee, I might well defer to the Honorable EDWARD BATES, of Missouri, then attorney general of the United States, who had expressly advised, that in cases of seizure under the revenue laws, where half the proceeds went to the officers of the customs, the right of a district attorney to receive compensation from them, if they chose to give it, was unquestionable. While in New York they never offered and I never asked it; in Philadelphia, the practice had been sanctioned by the usage of years, and has never been rebuked. Scrutinized by the jurist and statesman above named, my acceptance of the fee in this case has been approved, and he was my official superior at the time. By other lawyers, prominent and trusted, the same approval has been expressed.*

That it was my conviction no one could deem the acceptance improper, is shown by the open manner in which every thing was done. During the pendency of the suit, I mentioned all its incidents, freely, to persons in and out of the profession. The facts, fairly stated, I knew could not injure me. Any other representation of them, by one who evinced the satisfaction expressed by Mr. Mudgett, was not to be apprehended. My consent to the offer was not altogether selfish, for an assistant had referred the matter to me as one which opened an opportunity for innocent pecuniary advantage.

I have proved the thing offered Mr. Mudgett's own—by the law allowed and by the court awarded. I have proved, also, that he voluntarily gave it. Its acceptance was not prohibited by either the letter or the policy of the law of the land. On the contrary, while a statute gives the district attorney a salary for his ordinary labors, other laws provide additional and contingent fees as a premium upon diligence in special cases. For instance, in revenue suits where the government is plaintiff, he receives a commission of two per cent. when he collects money involved, and no com-

* See the letter of Mr. BATES, *ante*, page 12.

pensation when unsuccessful.* In revenue cases where the government is defendant, fees are certified to him by the court, and they are regulated in practice by his success as well as by his trouble.† In other cases, like provisions are made. And even in criminal prosecutions, the fee bill gives the district attorney fifty dollars if he convict, and twenty upon acquittal.‡ Under a special act which I drew, this last provision does not apply in this district; but it is a striking illustration of the general policy of the law, to which I have alluded. The framers of the confiscation laws made express provision therein for allowances to district attorneys; but by a palpable oversight, they omitted to guard against a general provision in an old law, which operated in this district, to appropriate those allowances to the United States treasury. The result of that unintended omission was, that the district attorney here was left without compensation under these two laws, while it was given to him under every other special statute passed during the augmented law business growing out of the late civil war. Among the special statutes referred to, was the "non-intercourse act," under which (it being a revenue law) the district attorney receives commissions contingent upon success, although it condemns "rebel property" upon principles similar to those upon which these confiscations rest. The law intended, but failed, to give me compensation here from the entire fund. I received it by voluntary gift from the informer's share. It was regarded by me as the well earned reward of an advocate. As such it was accepted.

It did not come to the attorney of the government from an opponent in the suit; but from its coadjutor, the prosecutor himself. As I have shown, the only influence it could exert, was to promote diligence in prosecuting a suit wherein the government and its informer were alike interested. It was the case of a lawyer employed by one joint creditor to prosecute a claim. In the progress of the suit, the other joint creditor, being equally interested, promises compensation. Certainly the first would not complain. Nor could the second, unless the victim of extor-

* 12 U. S. Stat., 741, § 11.

† 12 U. S. Stat., 741, § 12.

‡ 10 U. S. Stat., 162, § 1, paragraph 9.

tion. Of the existence of that, in this case, I think I have demonstrated the impossibility.

In the Indiana case, the court certified to the district attorney and his associate, equally to each, five thousand dollars from the entire proceeds, and then decreed a moiety of the remainder to the informer. Here, the government's share remained intact.

When the company required the allowance of the fee of their counsel, and it was proposed to tax the entire fund, I would not permit it. From the informer's share alone, although myself interested in that, I advised its payment. If I did injustice at all in the course of the case, it was in this, and on the government's behalf.

It has been intimated, that as a lawyer, holding a high office, I should not have received a fee from an informer, for the reason that he was such, and ought not, in fact, to have encouraged him at all. To this last suggestion, I might oppose the remark of a distinguished and upright lawyer, himself a consistent sympathizer with the South, who said, when I mentioned this criticism, "There is nothing in it; it was palpably your official duty to encourage informers under those laws." The contest for national existence is now determined; but the policy of confiscation had then, in the darkest days of a doubtful struggle, been adopted by my official superiors as auxiliary to the work of arms. During the long civil war, as public acts attest, I participated in the feeling which prevailed at the North. The hands of General Mercer, then an officer in the confederate army, seemed to me red with blood, in a conspiracy to destroy the government, without cause, in the interest of oppression and ambition. The law gave him notice to desist on pain of confiscation; and when he refused, proffered a reward for the discovery of property belonging to him protected here. Knowing nothing of Mr. Mudgett, beyond the fact that he brought this information while the country was gasping for life, the act did not suggest to me the character of an ordinary spy and informer.

If it was right to accept this emolument, it would have been wrong to refuse it. Improvidence is not a virtue; and men are not disinterested abroad, who are unjust at home. An act is honorable, if it be blameless; and a high toned mind will be slow in thinking as in imputing evil.

My connection with this case was exposed to criticism without a hearing from me, and under circumstances calculated, although not by you designed, to mislead. The resolution of the House of Representatives, under which your committee was sitting, directed inquiries into the custom house, not the courts.* If charges had been made against my office, they would have been referred to the committee on the judiciary. Yet your report, bearing at the top of every page the title "New York Custom House," was made, through two isolated paragraphs, the vehicle of irrelevant attack upon me in this case, and upon one of the courts in another matter. Having a personal grievance in relation both to that court and to me, the secret accusers, who gained and wronged your confidence, diverted attention from themselves and fixed it upon other objects. Moving in the dark and through indirection, they gradually changed their positions, and became trusted agents of your good purpose to expose abuses in the public service. Assuming to know and to state all the facts in relation to this case, they procured, in support of their allegations, the two *ex parte* statements attached to your report. With a show of fairness, they suggested the examination of Mr. Allen; but this did not help the matter because Mr. Mudgett's testimony was not shown, and Mr. Nelson's had not been taken. Hearing of the former, I applied to see it, but could not; it was not written out nor accessible; I inquired in relation to it, but learned it was not regarded as calling for notice. I offered to be myself examined, but was assured it was not necessary.† Mr. Mudgett's statement was given in October, 1864, and you inform me it would not have been printed, but for the implied weight its injurious inferences acquired by the testimony of Mr. Nelson, now thoroughly explained. Mr. Nelson's statement was not taken until March 1st, 1865, at Washington; when, upon the same day, on the eve of the adjournment of Congress, and without notice to me, the report was made. It

* This resolution was adopted January 11, 1864, and is as follows:

"Resolved, That the charges recently made of official misconduct in the New York custom house, in regard to the alleged shipment of contraband goods and supplies, and all matters of alleged misconduct in the management of the affairs of the custom house at New York, be referred to the committee on public expenditures."

† See the affidavit of the Stenographer of the Committee, appendix, page 53.

contains a brief summary of supposed facts. These are founded, of course, upon the *ex parte* statements before mentioned. I could not answer them at the time, because neither the report nor the testimony was brought to my knowledge, until subsequently published in a newspaper. I could do nothing to prevent their influence at Washington, because they were acted upon by the attorney general without notice to me. That officer at this time was not Mr. Bates, who knew me, but his successor, Mr. Speed, who did not. Supposing I had nothing to say, he gave me no opportunity for explanation, assuming that this had already been afforded by the committee itself. Although my office was of a grade little below his own and held by the same tenure, he did not communicate with me nor investigate the facts for himself, but took summary action upon a report to Congress, which Congress itself never acted upon.

All I heard was rumor; and I had been so often commended by my superiors, I supposed myself immovably anchored in their good opinion, at least until informed, as I never was, that detraction had succeeded in inducing them to listen. But the President was absorbed with the surrender of Richmond, and his first secretary disabled by a fall from a carriage. I had been in office over four years, and under other circumstances could not have complained if an eminent gentleman, much my senior, was appointed to succeed me. It is a satisfaction to know, Mr. Lincoln did not himself read nor pass judgment upon these statements;* he relied upon his law officer, who was himself misled by them, standing, as they did, and for the reasons above given, unanswered; and when a distinguished friend of mine, a few days before the President's death, explained the case to him, he authorized my retention in office and the recall of the new commission. But the latter was found to have been mailed, and it was too late.

Office, however, is not important. A good name is. And I thank you for this opportunity of clearing my official record from the only reflection ever thrown upon it. Pressed with affairs of greater moment, yourself and Mr. Speed acted inconsiderately with regard to this; but neither is stained with intentional injustice.

With perfect fidelity to truth, I have endeavored, in the fore-

* See Mr. Speed's letter, *ante*, page 11.

going statement, without resentment and without injustice to others, to bring to judgment all the facts of this case. From you who wrote, from your three associates who united in signing, and from the attorney general who acted upon the report wherein I was misjudged, I solicit the most searching scrutiny into my acts and motives. From one of the two witnesses whose *ex parte* statements were printed, I have received the most complete justification. From the other, I desire nothing beyond the declarations which I have cited from his testimony ; and I leave it, calling attention, only, to the depositions, records, and other proofs now produced.

The originators of the wrongful attack whereby my re-appointment was designedly prevented, have not been named. Their opposition had reasons honorable to me. Their hostility exhausted itself, and I am glad to believe exists no longer. Their movement was so secret and unfair, that when discovered it filled my mind with indignation and anger. By time and determination, those feelings have been allayed ; at least, I have been able to suppress their manifestation in this paper. Yet I will not quietly consent to be injured permanently in the good opinion of any just mind. To you and to truth, I look to correct misapprehensions which your report made public.

Having never been assailed, except in this instance, I confess to the pain of the new experience. But I may be pardoned for gratefully referring to the confidence expressed by my brethren of the bar ; the kindness evinced by leading political opponents with others ; and the undeviating support of my own party in New York, whose convention, a few months after the close of my official term, tendered me the unsought distinction of a nomination upon their judicial ticket as judge of the Superior Court.

From your report, however, I made no public appeal, because those who knew me did not require, and those who did not would not be convinced by it. Through a congressional committee, the injustice was done ; and from a like committee I had asked a hearing, when circumstances to which you most honorably yielded induced you to enter upon this investigation. The time has now come when, upon the most ample evidence, the authors of the report itself will do me justice.

I am, sir, very respectfully yours,

E. DELAFIELD SMITH.

STATE OF NEW YORK, } ss.
City and County of New York, }

On the fifth day of June, A. D., one thousand eight hundred and sixty seven, before me appeared E. Delafield Smith, with whom I am personally acquainted, who being by me duly sworn, deposes and says, that he drafted the foregoing statement; that the same is copied as he wrote it; that he has read it over as copied, and knows its contents; and that the same is true to the best of his knowledge, information and belief.

In witness whereof, I have hereunto set my hand and
[L. S.] affixed my seal of office, the day and year last
above written.

CHAS. M. HALL,
*Notary Public in and for the city
and county of New York.*



APPENDIX.

Mr. HULBURD TO Mr. NELSON.

ST. LAW. CO., N. YORK,
BRASHER FALLS, *May 10, 1867.*

GEORGE P. NELSON, Esq.,

SIR:—In 1865 you were examined before a congressional committee, of which I was chairman, in relation to a case prosecuted in 1863, by E. Delafield Smith, Esq., then United States district attorney at New York, for the confiscation of stock in the Minnesota Mining Company, owned by Hugh W. Mercer, a general in the rebel service.

It has been represented to me that your testimony, as it stands in the printed report, did Mr. Smith injustice, and that injurious inferences have been drawn from it, which it is believed would be removed upon your fuller statement.

You will, therefore, oblige me in making such explanations of your testimony, if any, as may be warranted by the facts, and give me all the information possessed by you bearing upon Mr. Smith's connection with the case.

If you will also be so kind as to verify your supplementary statement before an officer authorized to administer oaths, I will esteem it a favor.

I am respectfully yours,

C. T. HULBURD.

FROM Mr. GEORGE P. NELSON.

NEW YORK, *May 17, 1867.*

Hon. CALVIN T. HULBURD,

SIR:—Your letter of the 10th instant has been received. I take pleasure in complying with your request, particularly as my former testimony, as printed, was the cause of much misapprehension, and led to unjust reflections upon Mr. E. Delafield Smith.

It was far from my intention to appear as his accuser. Having mentioned that I had told Mr. Smith of this stock prior to the filing of Mr. Mudgett's information, I was some time afterwards subpoenaed to attend the committee at Washington.

My testimony was taken March 1st, 1865. It was brief, confined substantially to answering a few questions put to me. No one appeared on behalf of Mr. Smith, and hence there was, of course, no cross examination. If present, Mr. Smith could have brought forward facts, some of which have since come to my knowledge, showing his exemption from all blame.

As the matter now stands, it would *seem* that Mr. Smith's refusal to proceed, when I called upon him, was without good cause; whereas, *in fact*, he had a substantial and public reason for the refusal, as will hereafter appear. It would *seem* also, that his subsequent prosecution of the case, taken in connection with the refusal in question, was not open to fair explanation; whereas, *when the facts are stated*, it is plain that Mr. Smith acted as any honest official would have been likely to act under the same circumstances.

Although there was a misunderstanding on my part, the injustice to Mr. Smith, as founded upon my former testimony, was not so much in what was said as in what was omitted.

The report of the committee, referring to my testimony, says: "Mr. Smith assured him (me) there was no law by which *private property* could be forfeited." A reference to my deposition shows that such was not the language imputed by me to him. It is so expressed as to readily admit of such an interpretation; but the difference will soon be as evident as it is important. The words in the printed testimony are: "He said to me it could not be done; that there was no law by which property of individuals could be confiscated." Even as thus given it is evident from what follows that there is an important omission.

The point of the difficulty felt by Mr. Smith in the way of a prosecution is not exhibited. That difficulty related, not to the *individual* owning the property, but to the *situation of the property itself*. This is plain from my subsequent testimony, as follows: "I told him I understood differently; that an act was passed authorizing the confiscation of the property of rebels, persons guilty of such crimes as Mercer had been guilty of, and that it authorized the confiscation of it wherever it could be found. He said it could not be done." The words "wherever it (the property) could be found," indicate the difficulty in Mr. Smith's mind in the way of confiscating the stocks mentioned by me. And they show also, that in giving Mr. Smith's language, the words "in such cases," or some similar expression, ought to be inserted in my statement of what Mr. Smith said to me. Thus it should read: "He said it could not be done; that there was no law by which property of individuals *in such cases* could be confiscated."

I am satisfied that I misunderstood him at the time. The interview was a short one. I did not get the point of Mr. Smith's difficulty.

A little explanation will make the matter plain. At the risk of some prolixity, I take upon myself the making of this explanation, feeling that under the circumstances it is due from me to Mr. Smith. The rebel property men-

tioned by me to him was stocks of "foreign corporations," that is, of corporations created in other states. This I now understand Mr. Smith knew, and thus the difficulty occurred to him, but I did not know it.

The companies had business offices here, and I supposed them incorporated in this state. The Minnesota Company was in fact incorporated in Michigan. It had an office and transfer books in New York, but its corporate existence and its property were elsewhere. As Mercer, himself, then in the rebel army, had the *certificates* of stock, *they* could not, of course, be seized. The laws required an actual seizure of the property as the foundation of the proceeding. Mr. Smith considered a seizure impossible; there was nothing to seize. The confiscation laws did not provide for any proceeding in the nature of an attachment by notice on the company's officers, as in the case of the credits or effects of a non-resident debtor standing on the books or in the hands of third persons. Yet a proceeding akin to that was all the district attorney could do toward seizing this stock. It is true he afterwards carried a suit through and condemned it; but there was no defence, no litigation; judgment went *by default*. No one intervened for the owner, Mercer. The company appeared and thus probably conferred jurisdiction; at all events, they consented to the decree and transferred the stock to the court. So the question was not raised. As stated in my former testimony, I had not examined these laws; and if I had, the point might not have occurred to me, because I supposed the companies in question were New York corporations. Otherwise, the difficulty of Mr. Smith and his refusal to proceed would have been fully understood by me, and all misapprehension have been avoided. It is but just to Mr. Smith to say, that the difficulty was not only a substantial one, but that, in a subsequent case, in which the objection was raised and argued, *the United States Circuit Court here held that stock so situated could not be confiscated*; and thus, in the first litigated case, Mr. Smith's views of the law were adjudged correct, and his objection to commencing suit was justified. That was the case of stock of Le Roy M. Wiley in the Great Western Railroad Company, incorporated in Illinois, but having its transfer office and its agents in New York. It was argued by Mr. Larocque for the claimant and company, and by Mr. Evarts for the United States. The opinion has been published, and I believe its correctness in this respect has not been questioned by the bar.

I ought to mention that I have since learned an additional fact, which further explains Mr. Smith's unwillingness to proceed when I called upon him. In the fall of 1861 he had commenced a large number of suits under the first law, *which were discontinued by direction of the government, and confiscations pointedly discouraged by the district attorney's superiors*. After the new law was passed in 1862, enlarging the grounds of confiscation, district attorneys were informed by the attorney general that he would issue formal instructions to them under both laws. It appears that those new instructions, which encouraged confiscations as the former had discouraged them, were not received until after my application, and therefore that when I called Mr. Smith was guided in his indisposition to proceed by the supposed corresponding wishes of the executive department of the government; whereas,

when Mr. Mudgett applied, the tenor of Mr. Smith's instructions was the reverse.

I confess that I was surprised that after declining to prosecute, Mr. Smith some months subsequently should have undertaken this case at the instance of another person. But I filed no information, and left no memorandum, for I supposed the case could not be maintained, and as I did not intend, in any event, to accept any thing as informer, I had no personal interest to urge me to press the matter further; whereas, Mr. Mudgett did actually put an information on file, and thus became entitled to have the prosecution proceed, if at all, upon his information. He urged and insisted upon a suit, whereas I dropped the matter. As I understand, it is conceded by all, his offer of compensation to the district attorney's office was not made prospectively. It appears in the testimony of both Mudgett and Allen, that it was not mentioned till after judgment by default. It therefore, I should think, could have had nothing to do with the institution of the suit. When applied to by him, Mr. Smith raised the same objection which he had made on my application—declined to proceed—did so only after repeated importunities, and then as an experiment solely. This was the pioneer suit—the first case prosecuted in New York under the confiscation laws of 1861 and 1862.

As stated in my former testimony, when Mr. Mudgett applied, Mr. Smith had forgotten my application. He had forgotten it, too, under circumstances which would have rendered his recollection of it remarkable; for at my interview with him, I mentioned several corporations at the same time that I spoke of the Minnesota Company; I left no paper; no memorandum was made; and Mr. Smith was occupied with the pressure of official business of many kinds growing out of the war. When he told me, as stated in my former testimony, that he had forgotten my call, his manner was sincere.

It has been said that Mr. Smith should have proceeded under the second law alone, and not under the first, because the former does not provide for an informer and the latter does. If he had done so, he would not have encouraged the execution of these laws in other cases. But he did, in fact, proceed under both laws, as was his duty, so that, in case of litigation, he could succeed under either or both, according to the proofs. It is the practice, I believe, in the United States courts, to bring suit under all laws relating to the same subject, and under which such suit may be maintained.

As no defence was interposed, the bill was taken as confessed, all the allegations were alike held true, the court decreed judgment of condemnation by default without proofs, and the informer's right to recover his share became fixed. Mr. Smith could not deprive him of it, as was held by Mr. Justice Davis of the Supreme Court of the United States, in a case determined in Indiana, which I have examined, and in which the district attorney went into court and opposed the informer's claim.

It is only fair and just that these facts and considerations should be set forth in behalf of Mr. Smith by some one. My own unintended connection with reflections cast upon him in reference to this case, has since led me to look into the matter with a good deal of care; and I have made this supplementary statement somewhat elaborate, because I feel it due to him and to

me that I should state not only my conviction of the correctness and honesty of his conduct, but also my reasons for that conviction. The character of Mr. Smith in this community has always stood high. His connection with this case has furnished the only criticism, so far as I know, which his official and professional acts have ever received; and I shall be glad if the additional facts and explanations here given shall contribute to the entire exculpation to which I believe him entitled.

Very respectfully,

GEO. P. NELSON.

STATE OF NEW YORK, } ss.
City and County of New York, }

On the seventeenth day of May, 1867, before me appeared George P. Nelson, with whom I am personally acquainted, who being by me duly sworn, deposes and says, that the foregoing statement made and signed by him, is true, to the best of his knowledge, information and belief.

RICH'D. STACPOOLE,
Notary Public,
City of New York.

CASE IN THE EIGHTH CIRCUIT.

ABSTRACT OF RECORD.

UNITED STATES CIRCUIT COURT, EIGHTH CIRCUIT, DISTRICT OF INDIANA.

Before the Honorable DAVID DAVIS, Associate Justice of the Supreme Court of the United States.

THE UNITED STATES

v.s.

\$109,000 OF INDIANA STATE STOCK AND
\$12,000 IN CASH, OWNED BY SAMUEL MILLER, OF VIRGINIA.

Libel filed February 29, 1864, against the stock and accumulated interest. Alleges, in substance, 1. That Miller has aided and abetted the rebellion, contrary to the provisions of the act of July 17, 1862; and 2. That interest paid on the stock has been used and employed by him in aiding the rebellion, contrary to the provisions of the act of August 6, 1861.

Avers the filing of information; prays that the state officers may be cited to account for the stock and accumulated interest, and asks judgment of confiscation, &c.

Monition issued and published. Summons issued to auditor and other state officers.

March 19, 1864, Miller's default entered. The state officers appeared and answered, acknowledging that they held the stock, (describing it,) and also the accumulated interest belonging to Miller. The libel is not traversed, except that with regard to the interest on the stock, they state that it has not been paid to Miller nor to any person for him. The answers pray the protection of the court for the state and its officers.

Judgment of condemnation and sale entered.

May 12, 1865. The district judge having died, and his successor having been one of the counsel in the cause, the suit was transferred to the Circuit Court.

May 24, 1865. Writ of *venditioni exponas* returned.

June 5, 1865. Final decree. The following provisions contained in it are quoted entire :—

" And the court having inspected the record herein, and the same appearing to have been a cause of magnitude and importance, the court do approve the employment, by the district attorney, John Hanna, Esq., of Messrs. McDonald and Roache, as associate counsel for the government, in the management of this cause, and do now allow to the said district attorney the sum of twenty five hundred dollars, and to said McDonald and Roache a like sum of twenty five hundred dollars for their respective services in this cause, and do order the same to be paid to them by the clerk out of the fund in his hands for distribution.

" *And it further appearing to the court, that information was in this cause given to the officers of the government by means whereof the seizure, confiscation and sales in this cause were made, and the fund herein was realized, the court do find, that after paying all allowances, costs and commissions, as well those due in the District Court, from which this cause was transferred, as in this court, that ONE HALF THE NET PROCEEDS BELONGS TO THE INFORMER HEREIN, and one half to the government of the United States : It is therefore ordered by the court," &c.*

March 26, 1866. Record exemplified by the clerk under the seal of the court.

The record above mentioned is accompanied by the following letter :

CLERK'S OFFICES UNITED STATES COURTS,
Indianapolis, Indiana, March 30, 1866.

Hon. E. DELAFIELD SMITH, New York,

DEAR SIR :—In the case of the U. S. vs. \$109,000 bonds, &c., and Samuel Miller, the record of which has been sent you, I assure you, of my own knowledge, that the right of an informer to claim a moiety of the property condemned and sold, under the acts of Congress specified in the libel, was expressly raised, and I think counsel heard on the point; and that Judge DAVIS examined the statutes and decided orally the question, in that case,

admitting the informer's right. Mr. Hanna, the government attorney, is not here, or he would join in this statement.

Yours very truly,
J. D. HOWLAND, Clerk.

NOTE.

LAW, PRACTICE AND PRECEDENT.

The records referred to in the text at page 25, are of cases prosecuted in a number of the principal judicial districts of the United States. The Indiana case is placed at the head of the list, because, having been transferred to the Circuit, it was disposed of by a Supreme Court judge. The other cases were each determined in a District Court, as that would have been but for the death of the district judge.

As stated in the text, the proceedings are required by law to conform to those in "admiralty or revenue cases." (12 U. S. Stat. 591, § 7.) Where, therefore, no appearance is entered for the owner of the property proceeded against, the usual course of the judges has been to order judgment of condemnation and sale by default, taking the libel "as confessed," without proofs. (*Benedict's Admiralty Practice*, §§ 452, 454.) Some judges (and this is a question for them and not for the prosecuting attorney) have thought that proofs ought to be required even upon default of the owner to appear. Such, however, is not the practice in "admiralty or revenue cases," as may be seen by attending the United States District Court in New York on any Tuesday, which is a "return day of process," or by referring to the law reports in a newspaper published on any Tuesday evening or Wednesday. The libel is properly so drawn as to admit of the application of both statutes. The grounds of forfeiture are thus made broad, as they ought to be to meet any facts as they may be developed, and any defences which may be interposed. If the district attorney proceed under two laws separately, when he could file a single libel under both, the two suits will be "in effect consolidated," as was done by the court in the Philadelphia case cited in the text.

The allegations of the libel being made—and properly so—under the two laws, it follows that if it be taken "*pro confesso*," and the judgment directed by the court to be entered by default, as in admiralty and revenue cases, the forfeiture necessarily proceeds as much under one law as the other, and therefore under both. The informer's right to share thus becomes fixed in that way. The *dicta* of Mr. Justice NELSON in the Wiley case, (where, although the question was not discussed by counsel, that distinguished jurist expressed an impression unfavorable to the informer's claim as there allowed by Judge BETTS,) do not apply to the Mercer case; for in the Wiley case, an appearance was entered and proofs were taken; while here, there was no appearance, and judgment was entered by default without proofs. (See Mr. Justice NELSON's letter at page 51.)

But in the Indiana case, where the point was expressly raised and considered by Mr. Justice DAVIS, an accomplished member of the United States Supreme Court, the right is enforced as absolute; and it is there, in effect

held to depend, not upon the mode of proceeding or the effect of a default, but upon a comprehensive construction of the two laws taken together. This conclusion is not necessary to sustain the award to the informer in the Mercer case; but a thorough examination will show it is the true one. As stated in authorities cited in the text, "where one act is followed by another which does not repeal the first, and both are in *pari materia*, they are to be construed together, and effect is, if possible, to be given to every provision of each." The clerk of the Indiana court writes, "*Judge DAVIS examined the statutes, and decided orally the question in that case, admitting the informer's right.*" And this, although the record, through the answers filed by the custodians of the stock, showed that while it was true that the owner was in the army, neither the property nor its income had been used to aid the rebellion, and that therefore the facts were such as the act of 1862, rather than that of 1861, made the basis of confiscation. The broad and equitable view of the court is manifest in the language of the decree, as follows: "*And it further appearing to the court, that information was in this cause given to the officers of the government by means whereof the seizure, confiscation and sales in this cause were made, and the fund herein was realized, the court do find, that after paying all allowances, costs and commissions,*" &c., ONE HALF THE NET PROCEEDS BELONGS TO THE INFORMER HEREIN, and one half to the government of the United States." If any lawyer be found to say, that the informer in the Mercer case was not entitled to share, he ought to be candid enough to admit, that eminent judges have thought otherwise; and that judgments are given, not by district attorneys, but by courts. My own position is—1. That the right is sustained by law, authority, practice and public policy; 2. That assuming it is not, a question as to the informer's right did not, and would not naturally, present itself to my mind, and was not suggested by any person throughout the prosecution of that case; 3. That Judge BETTS signed this decree after retaining it several days, and after a careful examination of the two statutes.

If the confiscation laws were or could be administered without a general application and enforcement of the provision for informers contained in the one first passed, they would in that respect signally differ from other similar statutes of the United States. Whenever seizures and forfeitures are provided by the law making power, a portion of the proceeds to be recovered is promised to those who give information of the violations of law which those penalties are designed to prevent. This feature of our legislation is copied from that of other countries where its necessity had been demonstrated. Such provisions are uniformly found in the neutrality laws; in the laws relating to the revenue both from customs and from internal impositions; in the laws for the suppression of the slave trade; and in those regulating proceedings in prize cases. It would have been remarkable if any judge or district attorney, impressed with the duty of administering the confiscation laws in the midst of the late war when their enforcement was of national importance, had been ingenious to construe away, or quick to assume the repeal or limitation of this premium upon informations, without which the laws themselves would have been substantially a dead letter.

NOTE FROM MR. JUSTICE NELSON.

June 13, 1867.

DEAR SIR:

I have no objection to state, as is the fact, that while under the evidence taken in the Wiley case it was my opinion that the informer had no right to share in the proceeds, yet, as these statutes are framed, and were new and untried, I can easily see how this view of the law should have escaped both yourself and Judge BETTS. And, if the judgment had been taken by default without any testimony, (as I understand was the course in the Mercer case,) my opinion in the result might have been different.

Very truly yours,

S. NELSON.

E. DELAFIELD SMITH, Esq.

CERTIFICATE OF THE COMPTROLLER OF THE TREASURY.

TREASURY DEPARTMENT,

FIRST COMPTROLLER'S OFFICE, *July 1, 1867.*

E. DELAFIELD SMITH, Esq.,

late U. S. Attorney, New York City:

SIR:—Your note of the 28th ult., requesting an official statement relative to an item of account, has been referred to me.

In compliance with said request I have to state that in your report of fees and charges in confiscation cases allowed to and received by you up to 30th June, 1864, there was included the sum of \$1,237 87 allowed in the case of "The U. S. vs. 700 shares of the capital stock and dividends due thereon of the Minnesota Mining Company, belonging to Hugh W. Mercer." Said sum did not go to your use so as to effect an increase of compensation, but, like all costs in suits for the confiscation of rebel property, was accounted for to the treasury in your emolument return for the year ending 30th June, 1864.

The case specified stands first in your report of confiscation cases.

Very respectfully,

R. W. TAYLER, *Comptroller.*

AFFIDAVIT OF ASSISTANT DISTRICT ATTORNEY ANDREWS.

City and County of New York, ss.

GEORGE P. ANDREWS, being duly sworn, says, I was assistant United States district attorney during the official term of Mr. E. Delafield Smith, and also under his successor, Mr. Daniel S. Dickinson, and his predecessors, Mr. Theodore Sedgwick and Ex-Judge James J. Roosevelt.

In the spring of 1863, Mr. Benjamin F. Mudgett (then and until within a few weeks past a deputy collector of the customs) called at the office and inquired for Mr. Allen and for Mr. Smith, and they both being out, he had an interview with me in their absence. His business was to procure, as informer, a prosecution of certain stock in the Minnesota Mining Company, owned by Hugh W. Mercer, a general in the rebel army, with a view to its confiscation.

As I had special charge of the prize cases, I kept on fly-leaves of my own copy of United States statutes, a reference to laws concerning prize captures, and also to other enactments relating to forfeitures of property, as proceedings in prize were apt to be affected by such other statutes. Turning to the two confiscation laws, I looked at them and told him I did not think a seizure and condemnation of the stock referred to could be had. I understood he afterwards saw Mr. Allen on the subject. The fact was, no confiscation case had been commenced since the fall of 1861, when a number then pending were discontinued and the prosecution of such proceedings discouraged by the government. Since then the subject had received no attention in the office, and applicants (of whom there were many) were quickly dismissed.

The case afterwards conducted upon the information of Mr. Mudgett and the other confiscation suits which followed were attended to by Mr. Allen, and I was wholly occupied with other duties.

In the spring of 1864, months after the Mercer case was ended, Mr. Mudgett called and passed through the room then occupied by me into that of Mr. Smith. In the partition between them were two windows and a door which was open. I heard the conversation which ensued, and I will state its substance. Mr. Smith said, "What does this mean? I hear they are saying at the custom house you had to pay to get the Mercer case attended to." Mr. Mudgett, interrupting, "I have never said any thing of the kind." Mr. Smith continued, "You know it is not true; the allowance from your receipts was on your own proposition, made when you were delighted because we had obtained judgment; now if you have become dissatisfied, I will repay it to you." Mr. Mudgett's reply was, "Mr. Smith, there is some mistake about this; no one ever got any such story from me; I want nothing from you, for it was all perfectly voluntary on my part, perfectly." His peculiar pronunciation of the word "perfectly" (as though spelt "*pur*") struck me at the time. I have given substantially what he said in nearly as possible his own language.

Mr. Smith told him it was his duty to silence such a slander. Mr. Mudgett said he would, and would give those men down there (referring to the custom house) notice to mind their own business, as he was old enough to take care of himself.

GEORGE P. ANDREWS.

Subscribed and sworn to before me, }
this 1st day of July, 1867, }

WILLIAM GIROD,

Notary Public, N. Y. City.

NOTE FROM Mr. JOSHUA F. BAILEY.

61 CHAMBERS STREET, 18th June, 1867.

Hon. CALVIN T. HULBURD,

MY DEAR SIR:—During the spring of 1864, while I was acting as a special agent of the treasury department in this city, I examined deputy collector Mudgett at the custom house, in relation to the Mercer confiscation case, at the instance of one of the officers of the customs.

So many matters were then occupying my attention that I cannot at this time recall the particulars of Mr. Mudgett's statements to me, and the notes of the examination have been mislaid. I do remember, however, that they were not such as to make on my mind any impression unfavorable to Mr. E. Delafield Smith, then the U. S. District Attorney. If it had been otherwise, I should have pressed the inquiry further; as it was, I dropped it with the examination of Mr. Mudgett.

I am, respectfully and truly,

J. F. BAILEY.

AFFIDAVIT OF THE STENOGRAPHER OF THE COMMITTEE.

STATE OF NEW YORK, }
County of Onondaga, City of Syracuse, } ss.

THEODORE F. ANDREWS, residing in the city of Syracuse, being duly sworn, deposes and says:

Under the employment of the congressional committee, of which Hon. C. T. Hulburd was chairman, I, as stenographer, took down in short hand the examination and testimony of Benjamin F. Mudgett before Mr. Hulburd, October 20th, 1864, and afterwards copied the testimony out. From my manuscript the testimony was printed as it appears in the congressional report. I have compared the printed testimony with my manuscript, and they agree. The testimony as printed is a faithful transcript of what Mr. Mudgett stated on the examination.

After his examination was closed, Mr. Mudgett left his seat and stood up before the fireplace and conversed freely, and in answer to a question put to him by a gentleman standing near him, as to how he came to part with a portion of his receipts as informer in the case in question, he replied in substance that he promised it because he thought it would help the case along, and gave it because he had promised it, and it was his own to do as he pleased with, but that Mr. Smith had never done or said any thing to make him do it, and it was a notion of his own, and entirely voluntary on his part.

The testimony itself seemed to make very little impression at the time, and when Mr. Smith afterwards came before the committee he was told it was not necessary for him to be examined, and Mr. Mudgett's testimony was not shown him, as it was not written out, and my notes were not at hand.

THEODORE F. ANDREWS.

Subscribed and sworn before me, }
this 17th day of June, 1867, }

H. WHEATON, J. P., &c.

NOTE FROM MR. BETTS, CLERK OF THE UNITED STATES DISTRICT COURT, NEW YORK.

NEW YORK, June 12, 1867.

Hon. C. T. HULBURD,

SIR:—I saw Mr. Mudgett several times during the progress of the settlement referred to by my assistant, and so far as my observation and knowledge went, I concur fully in the statements expressed in the accompanying note. I heard Mr. Mudgett express his satisfaction with the manner that the business had been conducted through the office of the district attorney, and this after the settlement, as well as during the progress of the case.

Yours truly,

GEO. F. BETTS,
Clerk U. S. District Court.

NOTE FROM THE ASSISTANT CLERK.

UNITED STATES DISTRICT CLERK'S OFFICE,
Southern District of New York,

NEW YORK, June 12th, 1867.

Hon. CALVIN T. HULBURD,

SIR:—As assistant in the office of the clerk of the United States District Court in this city, I kept the court dockets, and attended to all the details of the confiscation cases prosecuted in this district in 1863 and 1864. I well remember the first and leading suit, called the Mercer case, in which Mr. Mudgett was the informer.

When Mr. Mudgett, accompanied by Mr. Allen, took the four certificates of the stock which represented his purchase, and carried them away with him, and also when, several days afterwards, he received a check for the balance of his information money, he expressed himself gratified and pleased with the result, and with his own good fortune as informer in realizing as he had, and he appeared and expressed himself particularly pleased with District Attorney Smith and his assistant. I remember these facts specially, because I myself gave Mr. Mudgett his certificates and paid out the checks in closing that case, and Mr. Mudgett was emphatic in his demonstrations of satisfaction. In his frequent visits to our office during the prosecution of this and other cases, the same gratification, so far as the district attorney and his office were concerned, was shown by him.

Under these circumstances I scarcely need say, that I was surprised to learn, some year or two afterwards, that he had said any thing indicating a different feeling on his part.

Respectfully yours,

R. S. BULLUS,
Assist. Clerk.

NOTE FROM Mr. CHAMBERS.

OFFICE OF CHAMBERS & POMEROY,
NEW YORK, June 18, 1867.

Hon. CALVIN T. HULBURD,

SIR:—I was counsel for Mr. Alexander Fullerton, secretary of the Minnesota Mining Company, in the suit brought by him in 1863 to enforce his claim to a part of the proceeds of certain stock of that company which had been confiscated by the United States government, as the property of Hugh W. Mercer.

The claim was founded upon the fact, alleged by the plaintiff, Fullerton, that Mr. Mudgett's information as to Mercer's stock in that company was originally given to Mudgett by Fullerton, upon the express agreement that Mudgett should use such information to secure the confiscation of the stock, and should account and pay over to Fullerton one half of all moneys to which Mudgett might become entitled as the informer in the case.

Some time after the commencement of the suit by Fullerton I called on the United States district attorney, Mr. Delafield Smith, at his office, in reference to this claim, when he expressed his surprise at hearing of the claim of Fullerton, and also his desire, so far as it was in his power, that justice should be done to Mr. Fullerton. At a subsequent interview Mr. Smith informed me that he had inquired of Mr. Mudgett as to this claim, and that the latter utterly repudiated it, but that, nevertheless, upon the statements made on behalf of Mr. Fullerton, he (Mr. Smith) would propose on behalf of himself and Mr. Allen to transfer to Mr. Fullerton a portion of the stock held by them respectively. The proposal was accepted on the part of Mr. Fullerton, and the transfer of (I believe) one third of the stock held by Messrs. Smith and Allen was accordingly made. Both Mr. Fullerton and myself had every reason to be satisfied with the liberality and sense of justice manifested by Mr. Smith, and with the frank and handsome manner in which he came forward in the matter.

Very respectfully yours,

WM. P. CHAMBERS.

NOTE FROM Mr. ALEXANDER FULLERTON.

NEW YORK, June 28, 1867.

Hon. C. T. HULBURD,

DEAR SIR:—I have read the foregoing letter, and the same is correct. But for the sense of justice and honorable action of E. Delafield Smith, Esq., I should have been deprived of all return for the information which I was in fact the first to give, and which Mr. Mudgett used without disclosing my name.

But for my information, Mr. Mudgett would never have known that Hugh W. Mercer was a stockholder in the Minnesota Mining Company.

Yours truly,

ALEX. FULLERTON,

71 Broadway.

LETTER FROM JUDGE WILLIAM FULLERTON.

NEW YORK, June 20, 1867.

Hon. C. T. HULBURD,

DEAR SIR :—It is due to Mr. E. Delafield Smith that I should make a statement as to the origin of a letter written by B. F. Mudgett to his assistant, Mr. Allen, and referred to in Mr. Smith's letter to you, under date of June 5, 1867.

The history of that letter is as follows :—I was connected with the first confiscation case prosecuted during Mr. Smith's administration of the office of district attorney, as counsel for the Minnesota Mining Company. I was employed by that company to protect its interest and to see that the confiscation was not to their prejudice.

During the progress of the litigation, at a meeting of the board of directors of that company, they remarked that the funds of the company ought not to be used to pay for any services which I rendered, inasmuch as they acted simply as stakeholders, and suggested whether my compensation could not be obtained out of the fund. I told them I thought it could not, but if they desired I would present the matter to the district attorney. I did so at a subsequent interview with him. His reply was, "The United States can give nothing, under any circumstances, but if Mr. Mudgett, the informer, sees fit to make any allowance out of his share of the proceeds I do not see that there can be any objection to it." My answer was, that if he saw fit to propose it to Mr. Mudgett he might do so. Mr. Smith's reply was, that he would bring it to Mr. Mudgett's attention ; and he afterwards informed me that he had suggested the matter, and that Mr. Mudgett had agreed to give a percentage of his share of the proceeds of the property as a fee to the counsel to the company.

Some time after the amended decree of confiscation had been entered the proceeds of the property were divided. I received from Mr. Mudgett a check for ten per cent. of the amount which was coming to him as adjudged to him by the decree. This he gave to me voluntarily when Mr. Smith was not present, and at the same time remarked that he was not making as much out of it as was supposed, because he was giving Mr. Allen, the assistant district attorney, a large fee for the extra trouble bestowed upon the case. Mr. Smith was not present at that conversation. Mr. Allen was.

Some time after the receipt of the fee paid to me as herein mentioned, I received a letter from Mr. Mudgett threatening me with some proceeding in the United States court unless I returned the amount, and intimating that I had taken it without the knowledge of my clients. In reply to that letter I wrote to Mr. Mudgett as follows :

[This note declines, in strong language, to accede to Mr. Mudgett's demand.]

At this time I thought it to be my duty to see Mr. Smith and put him on his guard against a man of so treacherous a character. Consequently I called

and stated to him the correspondence between Mudgett and myself, and warned him if Mr. Allen had received any thing from Mudgett, (as I was induced to believe from what Mudgett had said at the time of the final distribution,) that there would be trouble unless the voluntary nature of the transaction were put in black and white ; that Mudgett would resort to some means or other to put Mr. Allen and himself in a false position if he could.

Mr. Smith did not seem to think it possible that Mudgett would or could misrepresent the transaction to his or Mr. Allen's injury. But I assured him that he did not know Mudgett, and Mr. Smith finally said that he would take the precaution to get some kind of letter from Mr. Mudgett to show the real transaction, which I afterwards understood he did.

Very respectfully,

Your obedient servant,

WILLIAM FULLERTON.*

PAPERS AND LETTERS OF Mr. MUDGETT.

LETTER TO MR. ALLEN.

CUSTOM HOUSE, NEW YORK,
COLLECTOR'S OFFICE, Aug. 3, 1863.

SIR :

As a token of the satisfaction by me as informer in the matter of U. S. agst. certain shares of the Minnesota Mining Company belonging to the rebel general Hugh W. Mercer conducted by you so far as my interest was concerned, I have directed to be delivered to you one half that shall be awarded to me as informer, which I do cheerfully and voluntarily ; and besides, please accept my thanks which are hereby extended to you and the district attorney for your united energy and promptness in this matter, and by which you have rendered a faithful service to the government.

Yours truly,

B. F. MUDGETT.

To ETHAN ALLEN, Esq.

[In relation to this letter see page 29.]

Hon. CALVIN T. HULBURD,
Chairman Congressional Committee,

DEAR SIR :

I have received a document containing your report. In looking over my evidence as printed, I observe that the stenographer understood me as testifying that Mr. Smith said to me that he had no interest in the compensation to Mr. Allen in the Mercer case. Mr. Smith did say (as appears to have been the fact) that it was given to Mr. Allen ; but the inference that Mr. Smith was not interested in it was my own, and not Mr. Smith's statement. It seems to be proper that I should make this correction, for, as I understand the matter, it was not one that Mr. Smith ever concealed, or had any occasion to conceal. If the committee could have understood it as well as I do, it would not have been allowed to prejudice a gentleman of Mr. E. Delafield Smith's standing.

Yours respectfully,

WILLIAM FULLERTON.

* NEW YORK, April 8, 1865.

TO THE CLERK OF THE COURT.

[Mr. Mudgett having become a purchaser of part of the stock at the marshal's sale, requests the clerk of the court to have the certificates made out in Mr. Allen's name. The body and signature of this paper are both in Mr. Mudgett's handwriting, as follows:]

GEO. F. BETTS, Esq.:—

Having purchased shares of the capital stock of the Minnesota Mining Company now in your hands in the suit of U. S. vs. 700 shares of the capital stock of said company, &c., please make out certificates of said shares purchased by me in the name of Ethan Allen in four equal parts, as near as convenient, I being about to leave town for a few days.

Yours, &c.,

B. F. MUDGETT.

N. Y., Aug. 5, 1863.

BLANK RECEIPT.

[This receipt was left by Mr. Mudgett with Mr. Allen ; but was never used.]

U. S. DISTRICT COURT.

THE UNITED STATES <i>against</i> SHARES OF THE CAPITAL STOCK OF THE MINNESOTA MINING COMPANY, BELONGING TO HUGH W. MERCER.	
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Received, New York, August —— 1863, from George F. Betts, Esq., clerk of the United States District Court, — dollars, in full of my distributive share under the decree in this cause.

B. F. MUDGETT.

LETTER TO MR. ALLEN.

CUSTOM HOUSE, NEW YORK,
 COLLECTOR'S OFFICE, Aug. 10, 1863.

SIR:

I think you had better have the clerk make the certificates in your name, if he will, as the company would not be so likely to make trouble as if in my name. [See Mr. Allen's statement at page 64.]

You need not say to Betts that I have returned. I will call in at 3, if I do not hear from you before.

Do what will be the best interest of the holders. It would be great folly for the company to do as you state they threatened, as by so doing that would cut off all equitable claim they might have against the government, while it would not legally affect the certificates.

Yours truly,

B. F. MUDGETT.

ETHAN ALLEN, Esq.

TO THE CLERK OF THE COURT.

[Mr. Allen having declined to have the stock purchased by Mr. Mudgett taken in his (Mr. Allen's) name, Mr. Mudgett requests that the certificates be issued to another person.]

(TITLE OF THE CAUSE.)

GEORGE F. BETTS, Esq.,
Clerk of the United States District Court,

SIR:

Please have the three hundred and thirteen shares of the stock of the Minnesota Mining Company, purchased by me in this suit at eighty five dollars per share, as per return sales in your hands, transferred to and in the name of _____, in four certificates, three of seventy eight shares each, and one of seventy nine shares.

New York, August 10, 1863.

Yours respectfully,

B. F. MUDGETT.

LETTER TO MR. ALLEN.

Oct. 1, 1863.

DEAR ALLEN:

I saw Mather last evening; he recollects fully all the conversation, and the talk he and I had immediately after, and that there was no talk or intimation on the part of [Alexander] Fullerton that he desired or claimed an interest.

Yours, &c.,

B. F. MUDGETT.

E. ALLEN, Esq.

LETTER TO MR. ALLEN.

Dec 21, 1863.

DEAR SIR:

Don't move on Bank of Republic for a few days. I will be able to know from a personal examination.

Yours, &c.,

B. F. MUDGETT.

Mr. ALLEN.

LETTER TO MR. ALLEN.

CUSTOM HOUSE, NEW YORK,
COLLECTOR'S OFFICE, Dec. 28, 1863.

DEAR SIR:

I send you the dates and stocks in the Bank of the Republic, as they appear by inspection.

These cases require considerable attention. Please look to them individually aside from your duties as an officer, and I will divide equally with you what shall be made.

Yours truly,

B. F. MUDGETT.

ETHAN ALLEN, Esq.

NOTE.—In the cases mentioned in the above letter, no stock of rebel ownership was found, and nothing was realized.

STATEMENT OF ASSISTANT DISTRICT ATTORNEY ALLEN.*

In regard to the confiscation suit in which the stock of the rebel general Hugh W. Mercer, in the Minnesota Company, was condemned and sold in the summer of 1863, I have to state as follows:

The witness, George P. Nelson, who testified before the congressional committee that he called at the district attorney's office and had a conversation with Mr. Smith a few months before Mr. Mudgett filed a written information, was never heard of by me in any way in connection with this matter till I learned of his testimony before the committee during the month of March, 1865. An old file of informations against rebel property contains one, signed, sworn to and filed by Mr. George P. Nelson, Sept. 4, 1861, as informer against certain drugs and chemicals of rebel ownership, but it did not relate to Mercer nor to any stock in this company. And all confiscation proceedings set on foot so far back as that were dismissed by direction of the government, and none again attempted till this Mercer case was commenced.

With respect to Mr. Mudgett, my recollections are as follows: Some time in April, 1863, Mudgett met me in the chambers of the Supreme Court, and told me of this stock of Mercer's, and was anxious to realize as informer. I told him I thought nothing could be done with it. It is very likely I said you can get nothing out of it, meaning that the stock could not be successfully prosecuted. That in 1861 we had attempted confiscations in about fifty suits, and all were suddenly stopped by instructions from Washington. That since then the new law of 1862 had been passed, but that I did not see how this stock could be seized, and therefore it could not be condemned. That no confiscation case, except forfeitures under the revenue laws, had ever yet been carried through, and I did not believe the district attorney would allow a confiscation suit to be commenced unless he felt sure he would be successful in the prosecution. Mr. Mudgett thought differently, and we parted. Some time afterwards I found a written information against Mercer's stock, signed by him, upon my desk. I inquired when it had been left, and put the date of the receipt at the office upon it, which was May 12, 1863, and filed it, it being the first written information offered since the additional act of

* Mr. Allen was appointed an assistant by Mr. E. Delafield Smith; was retained by the late Mr. Daniel S. Dickinson, and is still continued in office under the present district attorney, Mr. Samuel G. Courtney.

1862. Within a day or so another information was sent or left by Mudgett to be filed, against the same stock, and which was explanatory of and fuller than the first. Subsequently, Mudgett met me on the street and elsewhere several times, and urged the prosecution of this suit. He said he had examined the laws and thought that they might be enforced; and that if I would get Mr. Smith's ear for an hour and go over the case with him, he believed Mr. Smith would consent to begin the suit. I still, upon all such occasions, reiterated my opinion as already stated, that the difficulties in seizure and in proofs were such as to make it folly to attempt the confiscation of this stock. Mr. Smith heard Mr. Mudgett, and concluded that if these statutes could be enforced at all against stocks of a foreign corporation, no fairer case for the attempt could be presented than this of General Mercer, and he gave direction that the experiment should be tried.

This confiscation business was at that time so new to our office, that I wrote to Mr. Carrington, the United States district attorney at Washington, or to his assistant, Mr. Nathaniel Wilson, and obtained the form of letters used by him in directing the marshal to make seizures in confiscation suits which he had commenced, but which he had not yet carried to condemnation. I thereupon drafted a like letter to the marshal here, filling up Mr. Carrington's printed blank. Upon receiving it, the marshal served a notice upon the company. A libel of information was filed June 5, 1863, drawn under the statutes of 1861 and 1862, and in accordance with the circular instructions of the attorney general of the United States, which treated the two laws together as one. These had been received some time before Mudgett's application, and they were very different from the instructions sent in 1861, directing the discontinuance of all confiscation suits not called for by the strictest construction of the law. The substance of the information was advertised fifteen days, as the law requires, in the public press. It appears in the libel that condemnation was asked against the stock of Hugh W. Mercer, therein described, for the benefit of the United States and the informer mentioned in the libel, in equal parts. On the return day of the monition, which was on the 23d day of June, the case was called, no defence was made, and the court, as appears by the entry of its clerk in the minutes, directed the property to be condemned by default without proofs, the allegations of the libel being taken *pro confesso*. And a decree of condemnation and sale in accordance with the libel was ordered by the court.

On the afternoon of the day of condemnation, or on the afternoon of the next day, Mudgett called at the district attorney's office, and was very much elated at what had happened. Said he had heard of it, or had seen an account of it in the newspapers, and thought he would step in on his way up town. Mr. Smith was not in the office, and Mudgett talked with me in Mr. Smith's absence. I told him I was surprised that there was no defence, and I said that the judge having condemned the property by default, the next thing was to make the Minnesota Mining Company transfer the stock. Mudgett then said we had done well in the case, and if we could carry the thing through he intended to be liberal. Nothing was asked or demanded of him, and voluntarily he gave me to understand that he designed to divide his in-

terest with me. As near as I can recollect the language, it was this: After congratulations, Mudgett said, "I intend to be liberal with you; I am bound to do the handsome thing, and I propose we go snacks; if I get \$15,000 out of it I shall be satisfied." I answered, "That is a matter about which I must refer you to the district attorney." Mr. Mudgett left, and said he would speak to Mr. Smith about it. This was the first intimation or offer in the progress of the suit, of any interest to be given by the informer.

I did not arrive at the office the next morning till late. It was about 11 o'clock in the forenoon when I saw Mr. Smith for the first time since the above interview. He said to me, "Mr. Mudgett has been here this morning, and says he is willing to give you one half of his interest as informer;" and continued Mr. Smith, "I told him I saw no impropriety in it, if he chose to do so." I then repeated to Mr. Smith my interview with Mr. Mudgett on the day before substantially as stated above, and told him that if Mudgett should actually do it, and he saw no reason for my refusing it, we would divide whatever Mudgett chose to give. "Well," said Mr. Smith, "I see no objection to it, for the interest of the government and of its informer are the same, and if it has any influence at all, it can only be to incite to greater diligence, by which the United States will be equally benefited; the government will receive all it is entitled to by the decree, and this will be the personal property of Mr. Mudgett." I never felt at all certain that Mudgett would at last make this allowance, until I found that he was actually arranging for the division of the stock bought by him into several certificates, and he said, "This has cost me nothing; I mean to make you a present out of it."

As before mentioned, the court's direction for the filing of the decree was entered in the minutes by the clerk on June 23d. Between that date and July 7th, the letter books and records of the district attorney's office show a constant succession of personal and written applications to the company and its officers for a transfer of the stock to the marshal or court. The filing of the formal decree which the court had directed to be entered as aforesaid, was suspended during that interval, because the district attorney thought the transfer of the stock ought to precede it. But the company's officers, in addition to many other objections, finally insisted that at all events the formal decree must be first filed and served upon them, and they would then see what they would do. It was accordingly filed, and a copy served July 7th.

The company, however, did not transfer the stock even then, but referred us to their counsel, Mr. William Fullerton, who thereupon called upon us and entered an appearance for them. He insisted that the decree should be more full in its directions as to the transfer of the stock, so that it might protect the company from any future claims from Mercer or his assigns, and that the transfer ought to be to the clerk of the court instead of the marshal. Accordingly Mr. Fullerton, after consulting Mr. Daniel Lord, as I was informed, drew an amended decree. Before it was entered Mr. Fullerton wanted the district attorney to pay his counsel fee out of the entire proceeds, as the company, he said, objected to paying it, they being only the custodians of Mercer's stock, and the matter being of no benefit to them. At this time Mr. Smith was in Washington. When he returned, the proposition was laid

before him; he said, he "would not pay one cent out of the share or interest of the United States." It was finally proposed and settled by consent of Mr. Mudgett, that Mudgett should pay Mr. Fullerton a counsel fee of ten per cent. on his half. The amended decree was then examined and signed by the judge and filed July 30th. (The original decree had been examined, signed and filed in the same way. In both the original and the amended decrees the judge gave the net proceeds to the United States and the informer in equal parts.) The stock was transferred by the mining corporation and was sold according to law, by Wallace & Co., brokers, appointed by the marshal upon Mudgett's suggestion.

The result, as appears from the records of the court, was as follows:

Total proceeds, including accumulated dividends,.....	\$61,970 16
Costs and expenses, including brokerage and fees and commissions of marshal and clerk,	2,791 89

	\$59,178 27
Moiety of entire net proceeds,.....	\$29,589 14
To the government's share add the costs and fees certified by the court to the district attorney, but by him paid into the United States treasury,	1,237 87

Received by the government,.....	\$30,827 01

At one of the sales, Mudgett himself purchased \$26,605 in amount of the stock and gave to the clerk of the court his check for that sum, requesting that as he had no money on deposit to meet it, it might not be presented or used, but returned to him as so much cash when the final distribution should be made.

He thus arranged with the clerk of the court to receive his distributive share in a return to him of his check for \$26,605 00
And in cash,..... 2,984 13

\$29,589 13

Mr. Mudgett thus became by purchase the owner of 313 shares of the stock. This purchase was made August 5th. On the same day, without consultation with me, Mudgett sent a notice or direction to the clerk of the court, drawn by him in our office, (as I recollect hearing at the time, and as I suppose from its being written on the peculiar kind of brief paper used in our office,) during the absence of both Mr. Smith and myself, to take the stock so bought by him in my name, in four certificates. Upon ascertaining this, I declined to take it in my name, because I thought that in becoming a stockholder in the company, I might incur some personal liability for assessments or otherwise. I spoke to Mr. Smith about it, and he said he would not allow it if he were in my place. On the 10th, Mudgett sent me a letter asking that I would take the certificates in my name, upon the ground that the company

would be less likely to make trouble, than if they were taken in his name. The apprehension of trouble grew out of an intimation of officers in the company that on issuing new certificates of this condemned stock, they should mark it "confiscated," which Mudgett apprehended would injure its value in the market when its resale should be attempted. (This intention the company finally abandoned.)

On my continued refusal to take the stock in my name, Mudgett sent a notice to the clerk to have the four certificates before mentioned issued to another person, which was done, and the usual blank powers of attorney were obtained from the latter and attached to the certificates, so that they could pass by mere delivery.

August 11th, the marshal made to the clerk return of sales. A day or two afterwards Mudgett called at our office; Mudgett and I walked up stairs to the clerk's office together. He now, having given his check to the clerk, as I remember the circumstances, took the four certificates of stock, which he had become entitled to as purchaser; but as they were in a third person's name, the clerk took my receipt for them, as acting for such third person, in accordance with a letter of authority from the latter. We then returned to the district attorney's office. Mudgett brought the stock down stairs in his hands to Mr. Smith's desk. Three of the certificates were for 78 shares each and the fourth was for 79 shares. We suggested that Mr. Smith should take the odd share and pay the difference, which Mr. Smith assented to, and gave a check to me for a quarter, and to Mudgett for a half of the estimated value of the odd share. Mr. Mudgett retained two certificates and one went to me and one to Mr. Smith. The above acts of Mr. Mudgett which I have related were done freely, and of his own accord, without any request or intimation whatever. Mr. Mudgett took his leave, cordially expressing satisfaction and obligation.

The letter dated August 3d, in which he states that his act was entirely voluntary, was set forth by me in full in my testimony before the committee.

It will be observed by what he says in his notice to the clerk, dated August 5th, that he was then expecting to go out of town, and that he supposed the case would be closed during his absence. In view of that he signed and left a receipt for his distributive share. The amount was left blank, for it was not then known exactly what it would be. The case was not closed until his return to the city, so the receipt was never used.

It was not till August 18th, several days after Mudgett took the stock, that the clerk made final and formal distribution and closed the case. On that day, Mudgett received a return of his check, which left him entitled to \$2,984 13, in cash, from which Mr. Fullerton received a fee amounting to \$2,958 91, being ten per cent. on the informer's share, as had been agreed by Mr. Mudgett and Mr. Fullerton as before mentioned. From the trifling balance of cash remaining in his hand as paid to him by the clerk, he, of his own accord, without any request or suggestion, paid Mr. Smith and myself half, coming to our office for the purpose. And he now again acted and spoke in a cordial, friendly way. Subsequently to this a Mr. Alexander Ful-

lerton, a clerk in the Minnesota Mining Company, claimed that he gave the information to Mudgett as his, Fullerton's, attorney at law, and demanded his share from Mr. Mudgett. Mr. Mudgett declined to recognize him in any way, and Fullerton brought suit to recover what he claimed to be his rights. The complaint, containing all the alleged facts in the case, was served, and Mr. Mudgett requested us to defend him.

Upon having an interview with the plaintiff's counsel Mr. Smith said he believed the plaintiff had given the information to Mudgett, although upon what terms appeared uncertain; that at all events he ought to be rewarded. And we gave him as a matter of equity one third of the stock which Mr. Smith and I held. With this Mr. Alexander Fullerton was perfectly satisfied and the suit ended. Mr. Mudgett would not do any thing. The balance of the stock held by me I sold, and realized upon it about \$4,000, and I understand Mr. Smith did the same.

We could see no possible objection to receiving compensation in this case, and it was accordingly accepted. I understood at the time that several gentlemen of official and professional prominence, to whom Mr. Smith spoke, (as he had said he intended to,) agreed with him that it was beyond question perfectly honorable and proper. I, myself, thought so then and I think so now.

This matter was never regarded by me as a secret, but I talked about it on all occasions as freely as of any ordinary transaction. I never knew of any other motive that prompted Mr. Mudgett to make the offer, than that which actuates any suitor who promises the lawyer who has undertaken his case a share of his recovery in the event of success.

Although the offer was made long after the suit was commenced, and even after the judgment was ordered and secured by default, yet a transfer from the company of the stock in question was yet to be obtained, and this bid fair to need diligence, management and skill. By the judgment, the informer's share was assured to him. He was certain to get it, if the property should be obtained. But the judgment would clearly be useless, unless the stock could be got from the company. Having voluntarily made the offer in the middle of the proceedings, he voluntarily kept it at the close. As he had spoken to me of his intention to apply for the appointment of marshal in case (as he then expected) there might be a change in that office, and had asked me if I would not endeavor to obtain the influence of Mr. Smith here and of friends of mine elsewhere, I imagined he might have had some aim connected with political favor, and I so stated in my testimony before the congressional committee. But I find Mudgett explains an additional motive in his testimony before the same committee. He says, that before the final decree of distribution was filed he considered that the decree could have been drawn under the act of 1862 alone, and he be deprived of all interest.

But he says this was not intimated by the district attorney, or by me, or by himself, but that being in this belief, he thought it was his interest to make the offer he did. As a matter of law, Mudgett was wrong in supposing that he could be deprived of his interest. The order of condemnation was to him and the United States in equal parts, and if the district attorney had

neglected to push on the suit or to recognize him in the decree, Mr. Mudgett could have gone into court and moved on the case himself and drawn his own decree. It seems, therefore, in fact, from his statement, that he made the offer that he did, in the fear that something might happen that never could happen, and which no one thought of but himself.

I will add, that the costs and fees allowed the district attorney, received in this case, were paid into the United States treasury, and did not go to the district attorney, as by a misapprehension stated in the report of the congressional committee.

On December 26th, 1863, four months after the Mercer case was closed, Mr. Mudgett filed an information against stock in the Bank of the Republic in this city; and on the 28th I received from him a letter, dated at the custom house, proposing and promising to divide with me his information money when it should be received in that case. It came to nothing, for the rebel stock supposed to be in the Bank of the Republic was not finally found. The letter came unsought and unsuggested by me, or, as I believe, by any person, and was Mudgett's own free act, and was written and signed without my knowledge of his intention to send it.

I add to this statement copies of a number of letters and papers, written, signed, and sent by Mudgett to me and to the clerk of the court.*

In the spring of 1864 an unfriendly feeling was exhibited at the custom house by some of the officers there towards the district attorney, and I was told that Mudgett had said that he had to pay to get the Mercer case along. As soon as I heard of this, I went down there and asked him what this report meant, knowing as I did, that the statement was entirely false. He replied in the most emphatic way that it was false; that he had never said so, and could not, because, as I very well knew, his gift was perfectly voluntary, and he added, that he had a right to do what he was a mind to with his own, and if any body meddled with that matter he would give him a piece of his mind. This is the substance.

In October, 1864, one of the congressional committee informed me that Mudgett had been before them, but I distinctly understood that he had not represented the matter as any thing but a free and voluntary act on his part, and a perfectly proper one on ours. I asked to see his statement, but it had not been written out from the stenographer's short hand notes, and they were not present. I was requested to make my own statement of the case; but as I understood, the matter was treated as of no account, and it was not considered necessary for Mr. Smith to be examined. My statement before the committee would probably have gone more into detail, and been much fuller and more complete if I had seen Mr. Mudgett's. It was, I think, more full as I gave it, than it appears in the congressional report, for much is evidently omitted. Mr. Smith was not with me the first day. He went over to the committee room the second day, and remained during my examination of that day, and wished to be examined himself, but it was understood that no examination of him was called for. This was in October, 1864. Mr. Nelson's

* See *ante*, pages 57 to 60.

statement was not taken till March, 1865, in Washington, and we knew nothing of it. Nor did we ever see either statement till afterwards published in the newspapers.

No intimation of compensation or contribution to our office was ever made to any person who ever filed an information there. From only one beside Mr. Mudgett was any ever received by me, or, as I believe, by Mr. Smith, and in that case the amount was small. Any person can verify this assertion by calling, taking the official list of informations which were numbered as they came in, and inquiring of any or all the persons who filed them.

In April, 1865, after Mr. Smith had held the office of district attorney for a term of four years and over, he was succeeded by the late Hon. Daniel S. Dickinson, who retained me as assistant district attorney, and I am still in the office as such. When Mr. Dickinson was appointed, several confiscation suits were pending, all prosecuted under both laws as in the Mercer case. Several more confiscation cases were commenced by Mr. Dickinson. As the Mercer suit had been found fault with, I requested him to relieve me from attending to these cases, and he did so. The questions which had been raised as to the two laws, and as to an informer's right to share, were talked over by him, and he examined the statutes and books of practice for himself. The result was, that in both pending and new cases, he pursued precisely the same course which Mr. Smith had taken, used the same blanks for libels and decrees which Mr. Smith had drawn, had additional decrees printed in the same form, filed a libel in each suit under both laws in the same way, drafted and presented to the court, had signed and entered, and filed decrees giving the informer half the proceeds, just as was done while Mr. Smith was in office.

This can be seen by referring to the records of the court, the docket of the district attorney, and the newspaper notices of law proceedings during the time.

ETHAN ALLEN.

City and County of New York, ss.

ETHAN ALLEN, being duly sworn, deposes and says, that he has read the foregoing statement, and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ETHAN ALLEN.

Subscribed and sworn to, this 11th }
day of June, 1867, before me, }

[L. S.]

A. C. WILLMARTH,

Notary Public.

